SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 554.

THE INTERSTATE COMMERCE COMMISSION, APPELLANT,

vs.

HARRY J. DIFFENBAUGH, EDMUND D. BIGELOW, AND CHARLES W. LONSDALE, AS OFFICERS AND MEMBERS OF THE BOARD OF TRADE OF KANSAS CITY, ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

INDEX.

	Original.	Print.
Citation	a	1
Admission of service	b	1
Bill of complaint	1	2
Exhibit 1.—Petition to Interstate Commerce Commission	22	17
Exhibit 2.—Order of the Interstate Commerce Commission	27	21
Exhibit 3.—Report of the commission	28	22
Appearance for commission	30	24
Demurrer	31	24
Defendants' reply to suggestion of complainants	35	27
Stipulation as to pleadings and order	36	27
Answer	38	29
Exhibit No. 1.—Report and opinion of the commission in the matter of allowances to elevators by U. P. R. R. Co.	71	81
Exhibit No. 2.—Report and order of the commission in the matter of allowances to elevators by U. P. R. R. Co.	83	99
Exhibit No. 3.—Supplemental report of the commission in the matter of allowances to elevators by U. P. R. R. Co.	92	113
Exhibit No. 4.—Report of the commission on rehearing in the matter of allowances to elevators by U. P. R. R. Co., and order	94	116
Exhibit No. 5.—Report of the commission in Traffic Bureau, Merchants Exchange, of St. Louis, v. C., B. & Q. R. R. Co. et al., and order	96	120
Exhibit No. 6.—Order modifying former order	110	141
Exhibit No. 7.—Order modifying former order	111	143
Exhibit No. 8.—Order modifying former order	112	145
Exhibit No. 9.—Report of commission	113	147

	Original.	Print.
Stipulation as to evidence	114	149
Replication	117	151
Stipulation as to evidence	118	152
Exhibit 1—Part 1.—Abstract of testimony before the Interstate Commerce Commission in the matter of allowances to elevators by U. P. R. R. Co.	120	153
Index to witnesses	120	153
Testimony of J. A. Munroe	121	154
F. T. Heffelfinger	124	158
P. C. Stohr	126	161
W. B. Biddle	127	162
W. C. Stith	128	164
H. Gower	129	165
J. F. Tucker	130	166
G. H. Crosby	130	167
T. F. Heffelfinger (recalled)	131	168
D. Miller	132	170
James E. Seaver	133	171
E. P. Peck	134	172
Mr. Heffelfinger	134	173
E. P. Peck	137	176
A. B. Jaquith	139	179
L. S. Gillett	143	185
L. T. Sowle	143	185
Geo. H. Crosby	144	186
Geo. Rupley	144	186
C. E. Spens	145	187
Geo. F. Powell	148	191
E. M. Leflang	149	193
George C. Thompson	150	194
C. F. Davis	150	194
Wm. H. Suffern	152	196
J. C. Lincoln	152	197
John J. Stream	155	200
S. McMurray	156	202
P. K. Winther	157	204
Wm. S. Warren	157	204
E. O. Moffatt	158	204
John Kelley	159	206
Guy Chase	160	207
H. Gower	160	208
E. J. McVann	162	210
T. J. Brodnax	162	210
J. A. Munroe	164	213
H. Gower (recalled)	168	219
James Pettit	169	220
N. Merriam	169	220
Mr. Heffelfinger (recalled)	170	222
Mr. Rankin	172	224
D. O. Ives	172	224
Exhibit 1—Part 2.—Abstract of testimony before Interstate Commerce Commission in the case of Traffic Bureau, Merchants Exchange of St. Louis, v. C., B. & Q. R. R. Co. et al	175	227
Index to witnesses	175	227

	Original.	Print.
Stipulation as to evidence—Continued.		
Exhibit 1—Part 2.—Testimony of George H. Crosby	176	228
C. C. P. Rausch	177	230
W. C. Stith	178	231
F. A. Leland	180	233
E. K. Vorhees	180	234
H. Gower	182	236
W. S. Washer	182	237
Bruce Inman	183	238
Geo. F. Powell	183	238
M. W. Cochrane	184	239
Marshall Hall	184	240
Order granting leave to file motion to file intervening petitions	186	242
Motion for leave to file amended petitions	187	242
Intervening petition, Wabash Railroad Co	188	243
Intervening petition, Chicago Great Western Railway Co	194	247
Intervening petition, Chicago & Alton Railroad Co	200	251
Intervening petition, Chicago, Milwaukee & St. Paul Railway Co	205	254
Exhibit.—Certified copy of extract from supplement No. 69 to St. L. & S. F. R. R. Co., freight tariff I. C. C., No. 5553, filed July 20, 1909	210	258
Exhibit.—Certified copies of schedules of certain railroads filed with the Interstate Commerce Commission	212	259
Decree	234	272
Petition for appeal	236	273
Assignment of errors	237	274
Order allowing appeal	240	276
Opinion	241	277
Certificate	270	296

a In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

HARRY J. DIFFENBAUGH, EDMUND D. BIGELOW, and Charles W. Lonsdale, as officers and members of the Board of Trade of Kansas City; Omaha Grain Exchange, a corporation; St. Joseph Board of Trade, a corporation; and William S. Washer, Edwin Lukins, and Samuel E. Harburger, as officers and members of the Atchison Board of Trade, complainants,

vs.

INTERSTATE COMMERCE COMMISSION, DEFENDANT; Chicago & Alton Railroad Company, Chicago Great Western Railroad Company, Wabash Railroad Company, and the Chicago, Milwaukee & St. Paul Railway Company, intervenors.

In equity. No. 3437.

CITATION OF APPEAL.

The United States of America, Eighth Judicial Circuit.

The President of the United States, to Harry J. Diffenbaugh, Edmund D. Bigelow, and Charles W. Lonsdale, as officers and members of the Board of Trade of Kansas City; Omaha Grain Exchange, a corporation; St. Joseph Board of Trade, a corporation; and William S. Washer, Edwin Lukins, and Samuel E. Harburger, as officers and members of the Atchison Board of Trade, or George T. Bell, John Barton Payne, and Frank Hagerman, their solicitors of record, and Chicago & Alton Railroad Company, Chicago Great Western Railroad Company, Wabash Railroad Company, and the Chicago, Milwaukee & St. Paul Railway Company, or Jones, Frank Hagerman, and John Barton Payne, their solicitors of record, Greeting:

b You are hereby cited and admonished to be and appear before the Supreme Court of the United States, at Washington, D. C., within 30 days from the date hereof, pursuant to the appeal sued out and filed in the clerk's office, in the United States Circuit Court for the Western Division of the Western District of Missouri, in the cause wherein the Interstate Commerce Commission is the defendant and the said Harry J. Diffenbaugh, Edmund D. Bigelow, and Charles W. Lonsdale, as officers and members of the Board of Trade of Kansas City; Omaha Grain Exchange, a corporation; St. Joseph Board of Trade, a corporation; and William S. Washer, Edwin Lukins, and Samuel E. Harburger, as officers and members of the Atchison Board of Trade, are the complainants, and the Chicago & Alton Railroad Company, Chicago Great Western Railroad Com-

pany, Wabash Railroad Company, and the Chicago, Milwaukee & St. Paul Railway Company, are the intervenors, to show cause, if any there be, why the decree rendered against the said Interstate Commerce Commission, as in said petition for appeal mentioned, should not be corrected and why speedy justice should not be done in that behalf.

Witness the Hon. William C. Hook, U. S. circuit judge for the Western Division of the Western District of Missouri, this the 1st day of April, in the year of our Lord one thousand nine hundred and ten.

WILLIAM C. HOOK,
Circuit Judge.

Service acknowledged April 1, 1910.

FRANK HAGERMAN,
Solicitor for Complainants.

Service acknowledged April 12, 1910.

HARRITT, HARRITT & JONES,
Solicitors for Chicago and Alton Railroad Company, and All Other Intervenors.

(Indorsed:) No. 3437. In equity. H. J. Diffenbaugh et al.
c *vs.* Interstate Com. Com. Citation. Filed April 13, 1910. Adelaide Utter, Clerk.

1 UNITED STATES OF AMERICA, *set:*

Be it remembered that heretofore, to wit, on the 17th day of December, A. D. 1908, a bill of complaint was filed in the office of the clerk of the Circuit Court of the United States for the Western Division of the Western District of Missouri, in the case wherein Harry J. Diffenbaugh et al. are complainants and the Interstate Commerce Commission is defendant.

Said bill of complaint is in words and figures as follows:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

HARRY J. DIFFENBAUGH, EDMUND D. BIGELOW, AND CHARLES W. LONSDALE as Officers and Members of the Board of Trade of Kansas City; Omaha Grain Exchange, a Corporation; St. Joseph Board of Trade, a Corporation; and William S. Washer, Edwin Lukins, and Samuel E. Harburger, as Officers and Members of the Atchison Board of Trade, complainants,

vs.

INTERSTATE COMMERCE COMMISSION, DEFENDANT.

BILL OF COMPLAINT.

To the honorable the judges of the court aforesaid:

Your orators, the above named complainants, present this, their bill of complaint, on behalf of themselves and all other persons, firms,

corporations, associations, or mercantile, agricultural, or manufacturing societies, or bodies politic, or municipal organizations whose interests are similar, or substantially similar, to those of the above named complainants, and thereupon they aver:

1. This suit arises under the laws of the United States, the matter and amount in dispute exceeding, exclusive of interest and costs, the sum or value of two thousand dollars.

2 2. Complainants Harry J. Diffenbaugh, Edmund D. Bigelow, and Charles W. Lonsdale are citizens and residents in Kansas City, Jackson County, Missouri. They are members of and president, secretary, and chairman of the transportation committee, respectively, and duly authorized to represent in this proceeding the membership of the Board of Trade of Kansas City, herein called the Kansas City Board of Trade, joining in this bill on behalf of themselves and of said members. Said Kansas City Board of Trade is a voluntary association at Kansas City, Missouri, composed of more than two hundred members, consisting of grain dealers, millers, and grain elevator operators, associated together chiefly for the objects of maintaining a general grain market, of facilitating the buying and selling of grain and its products, and generally of securing to themselves the benefits of co-operation in the furtherance of their business. Many of said members, known as commission men, are now and have been for many years engaged in buying and selling, receiving, and shipping grain produced in the States of Kansas, Nebraska, and other States tributary thereto, from which it is shipped on consignment or otherwise to Kansas City, where it is dealt in by said members, and subsequently sold for local consumption or for reshipment to other markets located northward, eastward, and southward from Kansas City. Many other of said members now and have for years owned and operated flouring and other mills of large capacities at or near Kansas City for the purpose of grinding the grain into flour and meal, said members later disposing of said products at many points north, east, and south of Kansas City. Still other of said members now and have for many years owned, leased, and operated large grain elevators at Kansas City for the purpose of storing, handling, transferring, and weighing of grain for the convenience of themselves and of the common carriers serving said city. The business of all of said members (the commission men, millers, and elevator operators) amounted in the year 1907 to a total if 111,033,450 bushels of grain, valued at $70,739,930.00.

3 The Omaha Grain Exchange is a corporation duly created and organized under and by virtue of the laws of Nebraska, with its chief offices located at Omaha therein, and is a citizen and resident of said State. Said exchange is maintained for substantially the same purposes, and has many members engaged at Omaha in the same lines of grain business as heretofore shown with respect to the members of the Kansas City Board of Trade. The total business of said members belonging to said Omaha Grain Exchange amounted in the year 1907 to 85,195,200 bushels of grain valued at $49,104,344.00.

The St. Joseph Board of Trade is a corporation duly created and organized under and by virtue of the laws of Missouri, with its chief offices located at St. Joseph therein, and is a citizen and resident of said State. Said St. Joseph Board of Trade is maintained for substantially the same purposes, and has many members engaged in the same lines of grain business as hereinbefore shown with respect to the members of the Kansas City Board of Trade. The total business of said members of the St. Joseph Board of Trade amounted, in 1907, to 6,500,000 bushels of grain valued at $9,000,000.

William S. Washer, Edwin Lukins, and Samuel Harburger are citizens of the State of Kansas, residing in the city of Atchison in said State. The said William S. Washer, Edwin Lukins, and Samuel E. Harburger are members of, and president, secretary, and chairman of the transportation committee, respectively, and duly authorized to represent in this proceeding the membership of the Atchison Board of Trade, a voluntary association of many members associated together for the same purposes, and engaged in the same lines of grain business as hereinbefore shown with respect to the members of the Kansas City Board of Trade. The total business of said members comprising said Atchison Board of Trade amounted in 1907 to 7,000,000 bushels of grain valued at $5,000,000.

4 The members of the said boards of trade and grain exchange have invested large sums of money in building up and maintaining their respective lines of business, and those of them who are in the elevator business have spent large sums in providing elevators and elevator facilities, all of which has been done upon the faith of the establishment of the markets and elevation practices at said Missouri River points, as hereinafter more particularly set forth.

The Interstate Commerce Commission, hereinafter called the commission, has been created and established and during all the times herein mentioned has existed, and still exists, under and by virtue of an act of Congress of the United States entitled: "An act to regulate commerce," approved February 4th, 1887, and the acts amendatory thereof and supplemental thereto. It is in substance a body corporate and subject to suit as a defendant herein.

3. The Chicago, Burlington and Quincy Railroad Company, Chicago and Alton Railroad Company, Chicago and Northwestern Railway Company, and the Illinois Central Railroad Company, hereinafter called, respectively, the Burlington, Alton, Northwestern, and Illinois Central, are corporations organized and existing under and by virtue of the laws of the State of Illinois; the Missouri Pacific Railway Company, St. Louis and San Francisco Railroad Company, Kansas City Southern Railway Company, and Wabash Railroad Company, hereinafter called, respectively, the Missouri Pacific, Frisco, Southern, and Wabash, are corporations organized and existing under and by virtue of the laws of the State of Missouri; the Chicago, Rock Island and Pacific Railway Company, hereinafter called the Rock Island, is a corporation organized and existing under and by virtue of the laws of the States of Illinois and Iowa; the

Union Pacific Railroad Company, hereinafter called the Union Pacific, is a corporation organized and existing under and by virtue of the laws of the State of Utah; the Missouri, Kansas and Texas Railway Company, and Atchison, Topeka and Santa Fe Railway Company, hereinafted called, respectively, the M., K. & T., and
5 Santa Fe, are corporations organized and existing under and by virtue of the laws of the State of Kansas; the Chicago, Milwaukee and St. Paul Railway company, hereinafter called the Milwaukee, is a corporation organized and existing under and by virtue of the laws of the State of Wisconsin; and Alpheus B. Stickney and Charles H. F. Smith are receivers of Chicago Great Western Railway Company, hereinafter called the Great Western, having been duly appointed as such receivers by the Circuit Court of the United States within and for the district of Minnesota, and are now in possession of the railways and properties of the said Great Western Company. All of said railway and railroad companies are common carriers, engaged in the transportation of property by railroad from many points situated in territory west of Missouri River, to, through, and from said Missouri River cities to many other points northward, eastward and southward thereof, as will be more fully shown hereinafter, each of them being engaged in business at St. Louis and Kansas City, Missouri. The principal operating office of the Southern and its entire system is at Kansas City, Missouri, and each of the other above-named railroad companies, excepting the Northwestern, have principal operating offices at Kansas City and at St. Louis, Missouri, the principal operating offices of the entire systems of the Missouri Pacific, Frisco, and M., K. & T. being at St. Louis.

4. The cities of Kansas City, Omaha, St. Joseph, and Atchison, hereinafter called Missouri River cities, because located on said river, are and have been for many years markets for grain and other products of the farm, having large grain elevators, mills, grain exchanges, banks, and other institutions and instrumentalities necessary and convenient for conducting and maintaining general markets and distributing centers. Said Missouri River cities are served by many lines of railway, reaching the great grain fields of Kansas, Nebraska, Iowa, Missouri, Oklahoma, and other States tributary thereto, which territory comprises the most fertile grain-producing section in the United States, and terminating at or passing through said cities to such markets as St. Louis in the State of Missouri, Chicago in the State of Illinois, Minneapolis and Duluth in the State of Minnesota, Memphis in the State of Tennessee, Galveston in the State of Texas,
New Orleans in the State of Louisiana, and many eastern
6 points. Having become large grain markets and milling centers and having these many lines of railway concentrating thereat and radiating therefrom, and being in close proximity to the grain territory aforesaid, said Missouri River cities afford and have afforded to the producers of said grain, good and ready markets for their products.

5. Many of the lines of railway serving said Missouri River cities traverse the great grain-producing sections aforesaid and have their eastern termini at one or more of said Missouri River cities, but do not extend to any markets east thereof; other large systems of railway have their western termini at one or more of said Missouri River cities and extend in an eastward, northward, or southward direction to the other markets hereinbefore mentioned; while still other large and extensive railway systems have lines extending from various points in the producing sections aforesaid, through said Missouri River cities to the other markets aforesaid located north, east, and south thereof on the Mississippi River, Great Lakes, Gulf of Mexico, and with their connections to the Atlantic seaboard. The first mentioned railways, viz, those with eastern termini at said Missouri River cities, in conjunction with the second mentioned railways, viz, those with western termini at said Missouri River cities, are competitors of said last mentioned railways, viz, those with lines extending from the producing sections to and through said Missouri River cities to the eastern markets aforesaid; so that there has always been and is now engendered at said Missouri River cities a most active competition between said railways for the transportation of grain to and from said Missouri River cities.

6. Of the vast quantities of grain handled at said Missouri River cities, as hereinbefore shown, a very small percentage, possibly not more than ten per cent thereof, is consumed or finds its final market at said Missouri River cities. The balance, or about ninety per cent, is purchased by members of the boards of trade and exchange aforesaid, shipped to them at said Missouri River cities, where it is treated, cleaned, mixed, clipped, weighed, and possibly stored for a time, and then reshipped to the other markets aforesaid, to the eastward,
7 northward, and southward, for consumption thereat or further shipment therefrom to other points in the United States and to foreign countries. The movement of the grain from the large producing territory aforesaid is not constant and regular throughout the year, but is largely confined to comparatively short seasons, depending more or less upon the size of the crop and the range of obtainable prices. During the grain-shipping season there is a pressing demand for cars, particularly when market conditions tend to stimulate prices. Again, it is a fact and a matter of common knowledge that the last few years have been exceptionally prosperous in all lines of trade, so that traffic of all kinds has been offered for transportation in unprecedented volumes. Although the above-named railway companies and other railways serving the territory aforesaid, have in common with other roads, made large additions to their car and locomotive equipment, said railways have frequently been unable to meet the requirements of the shipping public. The growth of the traffic has exceeded and continues to exceed the transportation facilities. So the seasons are frequent when shippers are faced with a so-called car famine. Years ago this question began to receive serious consideration by said railways. Those lines of rail-

way having eastern termini at said Missouri River cities could ill afford, in justice to their patrons, to allow their cars to run beyond said cities in order to carry to distant destinations the grain originating on their lines, as by so doing said equipment passed beyond their control and was absent for varying and uncertain periods. The railways running through said Missouri River cities were in somewhat the same position. They could not conveniently allow their cars to run through to their far-distant termini, as then too much time was consumed in returning said equipment to the producing fields for further loading. Again, the loading of cars at country stations was frequently comparatively light on account of local conditions at the points of origin, consequently the economical movement of said grain for the long distances carried when destined east of said Missouri River cities, required heavier loading of cars than could ordinarily be secured at the local stations of the initial lines. To meet these various situations, brought about by competitive and operating conditions, the railways provided for the transfer of the grain from the initial cars to other cars at said Missouri
8 River cities, said cities being selected because of their geographical location and because the eastern and western termini of so many of the railways aforesaid were at said Missouri River cities, so located upon the faith of their being great market points. This transfer was at first effected by shovel from car to car, the loaded car being switched upon a track elevated about three or four feet above an adjoining track where was placed the empty car into which the grain was to be shoveled—i. e., transferred. This crude process consumed much time, and entailed more or less loss of grain, and was finally, for the most part, abandoned in favor of the modern grain elevator.

7. The published tariffs issued by the railroads traversing said territory and duly filed with the commission provide for the charging and collecting of rates on the grain transported as aforesaid on the basis of so much per 100 pounds, and to ascertain the total charges on a carload of grain it therefore has always been, and is now, necessary to provide facilities for securing the correct weights of all carloads transported. Again, as grain is carried in bulk in ordinary box cars, the same as those used for miscellaneous freight, a loss in transit through leakage is not infrequently sustained; proper and adequate weighing facilities are, therefore, also essential to the carriers for checking and verifying the shipper's claim for the amount of such loss. These weighing facilities were at first provided by installing track scales upon which the loaded cars were switched and weighed. It developed that, although the carriers endeavored to keep same tested, said scales were a large part of the time inaccurate, due mostly to climatic conditions. The tare weight of loaded cars as determined by said scales was frequently inaccurate also in that the "light" weight, as stenciled on the side of a car when new, was not changed often enough to always record the correct weight of the empty car. For example, it is very often necessary to repair cars

for the loading of grain, such as putting in new doors or strengthening the sides. These repairs may and often do change the weight of an empty car, and with no change made in the weight as stenciled on its sides, it is evident that proper weights upon which to
9 assess freight charges and verify claims cannot thereby be secured. This method of securing accurate weights of cars loaded with grain was therefore abandoned and the plan of securing said weights by means of hopper scales in grain elevators adopted, until now it has become a universal custom, and an essential part of the method of handling and transporting grain, the abandonment of which would demoralize the trade, render weights uncertain, and greatly increase the cost of handling all kinds of grain.

8. Three plans were suggested and adopted by said railways to provide said grain elevators with which to properly and expeditiously transfer, at said Missouri River cities, the grain from the cars of the initial carriers to cars of the carriers which were to transport said grain to final destination; and by means of hopper scales in said elevators, to ascertain the correct weights upon which to assess freight charges and verify shippers' claims in event of loss in transit. First, some of said railways erected said grain elevators at one or more of said Missouri River cities, and then leased them for valuable considerations to certain of the members of said boards of trade and exchange, who furnished the employees, kept the machinery and appliances in repair, and in other ways put to much expense in the operation of same. Said railways agreed to pay and did pay to those of your orators who operated said elevators, for a long period, 1¼ cents per 100 pounds, and subsequently thereto ¾ of 1 cent per 100 pounds for all of such grain transferred through and weighed in said elevators. Second, one of said railways having its western termini at said Missouri River cities, in order to meet the competition of other lines in providing proper and adequate instrumentalities for transferring and weighing of grain, erected its own elevators at three of said Missouri River cities, and with its own employees operated and still operates said elevators. Third, still other of said railways serving one or more of said Missouri River cities encouraged certain of your orators to erect said grain elevators upon their several lines at said Missouri River points, and for the services of transferring and weighing the grain handled by said lines arranged and, in effect, agreed by the publication of proper tariffs filed with the commission, to pay to any and all persons operating grain elevators, for a long period 1¼ cents per 100 pounds, and subsequently ¾ of 1 cent per 100 pounds.
10 9. The services of weighing, elevating, and transferring of grain at said Missouri River cities were and are absolutely essential to the railways serving said Missouri River cities; said service of weighing is part and parcel of elevation and necessarily incident, as hereinbefore shown, to the assessment of freight charges and verification of claims, and the weights determined in said grain elevators operated by your orators are actually used for the purposes aforesaid; and said services of elevation and transferring are neces-

sary on account of operating and competitive conditions peculiarly obtaining at said Missouri River cities, over which conditions said railways have no control. In addition to the things hereinbefore mentioned, the use of modern grain elevators for the performance of said services is also essential and convenient to said railways in this: When the grain was transferred by means of shovels, as explained aforesaid, it was necessary to switch the cars containing the grain to certain tracks constructed as aforesaid; and when said grain was weighed upon track scales, it was necessary to again switch said cars to other and different tracks in order to reach said scales, which were located, in many instances, some distance from said tracks used for transferring the grain. By the use of modern grain elevators said railways have been, and are now, enabled to have these services performed by one movement of the cars (instead of two, as aforesaid), as both of said services are performed in and through said elevators, thus greatly diminishing and relieving the congestion and delay in railway yards which obtain during the grain shipping seasons. Your orators who are now operating said grain elevators have invested many thousands of dollars in providing said services for said railways; they have relied in good faith upon the matters and things aforesaid which prompted the railroad companies to make arrangements with them for said grain elevators, and they desire to continue, and are entitled to have continued, the rendering of said services for the compensation hereinbefore mentioned.

11 10. Those members of said boards of trade and exchange operating said grain elevators not only relied upon the practices and representations aforesaid and upon the establishment of the markets aforesaid, but were also entitled to and did, in making their large investments, rely upon certain acts of the commission and of Congress upon the subject, now about to be stated. In July, 1902, the commission, of its own motion, made inquiry of the arrangement under which, at two of said Missouri River cities, the services hereinbefore mentioned were furnished for a valuable consideration to the Union Pacific by Frank H. Peavey & Co., hereinafter called the Peavey Company; but took no action with reference thereto. Afterwards, to wit, upon May 7, 1903, the commission at the instigation of a rival carrier of the Union Pacific instituted a second investigation of the aforesaid arrangement. The Union Pacific and the Peavey Company appeared and each, among other things, contended that the commission had no jurisdiction and could therefore make no order relative to said arrangement, because the fact was that said services of elevating, weighing, and transferring were but incidents to as distinguished from interstate commerce itself. After full hearing and submission of extended printed and oral arguments by counsel of the rival carriers, the commission upon June 25th, 1904, rendered an opinion finding and declaring among other things, the following which were and are facts:

(*a*) Said arrangement was entered into and carried out in good faith and large sums of money expended in reliance thereon.

(*b*) The transfer and elevation services were only made at the termini of said railroad and were absolutely essential and indispensably necessary for the expeditious and profitable handling of the grain business of said roads.

(*c*) Payment to the Peavey Company for said services in no wise affected the freight rates, deprived competitors of the said Union Pacific of no business, and was not reflected in prices paid for grain at points of origin.

(*d*) One and one-quarter cents per hundred pounds for said services was a reasonable and just compensation therefor, and the said road being entitled to perform said services itself or hire others to do so, had perfect right to hire the Peavey Company and make payment therefor as said services were rendered.

In their report to Congress in 1905 the commission, having been impressed with the contention of the Peavey Company that said services were but incidents to interstate commerce and, there-
12 fore, not within the provisions of the act to regulate commerce, made an appeal for including same in these words:

"*Terminal roads, elevator charges, and private cars.*—There is an important class of cases, in which the owner of the property performs a part of the transportation service, where the carrier, by paying such owner an extravagant sum for the service rendered, thereby prefers him to other shippers of like property. This may happen in any case where the shipper is the owner of any of the facilities of transportation or performs any part of the transfer service. Such performance may take the form of an excessive division to a terminal road owned by the shipper, the payment of an excessive elevator charge to the owner of the grain; the payment of an excessive mileage upon the private car which conveys the property of the owner of the car. Our investigations leave no room for doubt that all these methods are at the present time more or less resorted to for the purpose or with the effect of preferring one shipper to another. It has been suggested that the Congress should prohibit railways from employing any agency or using any facility in the transportation of property which is furnished by the owner of the property. We hesitate to recommend at this time so drastic a measure as that. Assuming that such a law would be a constitutional exercise of authority, it would seriously interfere with property rights which have grown up under the present system. Moreover, there are many instances in which the services can be rendered or the facility furnished more advantageously both to shipper and railway; and without injury to the public, if provided by the shipper itself. We do think, however, that the commission should be empowered in a case of this kind to determine whether the allowance to the property owner is just and reasonable compensation for the service rendered and to fix a limit which shall not be exceeded in the payment made therefor. Such a remedy would not be altogether adequate, and any remedy is extremely difficult of application, but nothing better appears to be available."

The commission urged, before the congressional committee, that the law be amended. Congress responded to this request by passing the amendment on June 29th, 1906 (34 Statute at Large, 584), making interstate "transportation" include said services, said act containing:

13 (*a*) A provision reciting:

"And the term 'transportation' shall include cars * * * and all services in connection with the receipt, delivery, elevation and transfer in transit, ventilation, refrigeration or icing, storage and handling of property transported, and it shall be the duty of every carrier, subject to the provisions of this act, to provide and furnish such transportation upon reasonable request therefor, etc."

(*b*) One requiring the carrier in its published tariff to separately state:

"All terminal * * * storage * * * and all other charges * * * all privileges and facilities granted or allowed * * *."

(*c*) Another giving the shipper the right to furnish the facility by providing:

"If the owner of property, transported under this act, directly or indirectly, renders any service in connection with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable, and the commission may, after hearing on complaint, determine what is a reasonable charge as a maximum to be paid by the carrier or carriers for the service so rendered or for the instrumentalities so furnished, and fix the same by appropriate order, which order shall have the same force and effect and be enforced in like manner as the orders above provided for in this section."

In the light of the previous history of the commissions' investigations, it is manifestly apparent that Congress desired the above provisions to be applicable to the situations hereinbefore explained, and to permit those furnishing services to carriers to be paid reasonable compensation therefor. Many of the members of said boards of trade and exchange were acquainted with said investigations and subsequent legislation with respect to said services, and either themselves thereafter erected grain elevators, or entered into like arrangements with some of the above named railways to lease elevators erected by them, while still others relying in good faith upon the things aforesaid and upon the declarations in tariffs of said railways that the performance of said services would be paid for by them, invested large sums of money in erecting many elevators.

11. In July, 1906, after the passage of the amendatory law aforesaid, and upon the petition of still another rival railway of the Union Pacific, the commission, without hearing or notice of any kind, summarily ordered the former case involving said arrangement between the Union Pacific and the Peavey Company reopened

14 for further evidence and argument. A hearing was had, additional oral and printed arguments submitted, and upon April 9, 1907, an order was entered against the Peavey Company and its

subsidiary companies, declaring that, under the law as amended, it was the duty of the carrier to furnish such transfer and elevation services, which duty could be performed by paying the shipper for the performance thereof, but that the payment of one and one-quarter cents per hundred pounds was in excess of the actual cost and to the extent of the excess should be treated as unlawful; wherefore the same was reduced to three-quarters of a cent per hundred pounds, as hereinbefore mentioned. The former charge was not found to be unreasonable, but the finding was that no payment could be made in excess of the actual cost. Concurrently with the above date and in pursuance of the order made in the above investigation, said railways amended their tariffs reducing the payments to be made to said members and others for performing said services, to three-quarters of one cent per hundred pounds. Thereafter and upon the faith of this holding, said members invested much additional money in providing and maintaining elevator properties and facilities. In the entire grain business at said Missouri River cities, much money was spent in conforming the business and practices to said decisions, to the extent that payment by the railways for the services of elevating, weighing, and transferring became a necessary element in the conduct of the grain business and the maintenance of the markets. If deprived thereof said Missouri River cities will be greatly impaired as markets.

12. Late in 1907 complaints were filed with the commission by the traffic bureau of the Merchants Exchange of St. Louis (copies of which are hereto attached and marked "Exhibit 1" and made a part hereof) against the Burlington, Missouri Pacific, Rock Island, Frisco, and M., K. & T., praying the commission to order said railways, in effect, to cease and desist from making payments of anything to elevator operators operating elevators at said Missouri River cities. Neither your orators nor anyone representing them were parties to or notified of the institution of said proceeding.

The defendants in said proceedings in due time filed their answers to said complaints; formal hearing was had without the knowledge of your orators or anyone for them, at which time representatives of said defendants appeared as witnesses for the complainant; and said witnesses uniformly testified that the payments were made by their respective roads at said Missouri River cities on account of actual and controlling competition and substantially because said services were indispensably necessary and essential to said defendants. Later, to wit, on June 29, 1908, the commission rendered its decision in which it disregarded the statute so enacted by Congress in response to the recommendation of the commission as aforesaid and held that regardless of the reasonable value of the service and the necessity therefor, there could be no payment for the elevation and transfer services and entered its final order in the premises (copy of which order is attached hereto and marked "Exhibit 2"), prohibiting said defendants from making any payments for the rendering of said services at said Missouri River cities from and after

October 1st, 1908, which date was thereafter extended, upon the application of your orators, to December 1st, 1908, and again until July 1st, 1909, your orators in the meantime having been informed of the proceedings and order aforesaid.

13. Thereafter, upon September 26, 1908, parties representing your orators filed with the commission by its leave petitions to reopen the cases above mentioned and grant a rehearing. Said petitions were supported by briefs prepared by counsel and among other things claimed that the order of the commission above mentioned was unjust and improperly made; that even upon the theory adopted was discriminatory against your orators doing business at said Missouri River cities in that said payments were prohibited at said Missouri River cities, but not elsewhere, and that the services for which payments were made were essential to the carriers. Notwithstanding the testimony of representatives of said defendant railways and the prayers of your orators, the commission, upon October 16, 1908, rendered its final decision (copy of which is hereto attached and marked "Exhibit 3"), refusing the application for relief made by your orators, and confirming its former order making it unlawful to make said payments for the rendition of said services at Mis-
16 souri River cities. Said final decision of the commission not only was directed against the railway companies which were parties thereto, but undertook to direct and order all other carriers to cease and desist from paying for any elevator or transfer service. The commission, however, finally extended the date after which the defendants must cease making said payments to July 1st, 1909, the decision making said extension being as follows:

"Suit has been already begun to vacate the order of the commission prohibiting payments for elevation under the Peavey contract, and certain grain interests upon the Missouri River desire a judicial determination of the question underlying our order in these cases and are about to institute injunction proceedings. The commission recognizes the propriety and desirability of securing such judicial determination and is joining in the attempt to bring these suits to a speedy conclusion.

"It is evident that if the payment of these allowances were stopped at certain points and to certain persons, while continuing at other points and to other persons, a condition of discrimination and confusion might result which would be much worse than that intended to be corrected by our order in these cases. It has, therefore, been decided to postpone the effective date of that order until July 1, 1909, and to recommend to carriers generally that any action contemplated in view of that order be deferred to the same date. It is believed that if all parties cooperate the opinion of the Supreme Court of the United States can be obtained within that time."

In and by the act entitled "An act to regulate commerce," approved February 4, 1887, and the acts amendatory thereof or supplementary thereto, the powers and duties of the commission are specifically defined and prescribed; the commission has no power or

authority under said act, either expressly or by implication, to prescribe that common carriers may not furnish facilities for the weighing, transferring, or elevating of grain; no power or authority is contained in said act, either expressly or by implication, to justify said order of the commission prohibiting the rendition of said services or the making of payments therefor to your orators and others similarly situated for rendering said services; and said order is null and void, and of no validity whatever, and the commission was and is without any power or authority in law to make
17 the same or to enforce the same; and the commission exceeded its powers and was without jurisdiction in that behalf; said pretended decision and order of the commission is contrary to law, and is in violation of the Constitution of the United States, in that the effect of the enforcement of said order is to deprive your complainants and all others similarly situated of their property without due process of law, and to deprive them of the equal protection of the law, and is a restraint upon the liberty of contract and of making lawful contracts with railroad companies and from receiving payment for services rendered, and of proper, necessary, and legal facilities actually furnished, for the weighing, elevating, and transferring of grain; and the said order and decision of the commission impairs the obligations of existing legal and binding contracts of the complainants' members and the members of other corporations and voluntary associations and individuals on whose behalf this bill is filed.

14. Acting in response to the last-mentioned order of the commission prohibiting the payments at said Missouri River cities, the Burlington, Missouri Pacific, Rock Island, Frisco, and M., K. & T., conceiving that they are bound by said order, although unlawful as aforesaid, and fearing that the commission will, if necessary, institute judicial proceedings to enforce same, will obey said order, and because thereof will prepare amendments to their tariffs providing for said payments at said Missouri River cities, which amendments will declare that beginning July 1, 1909, no payments will be made to elevator owners or operators for performing the hereinbefore mentioned services, although absolutely necessary, legal, and essential to said railways. The other railway companies, the Santa Fe, Alton, Northwestern, Illinois Central, Kansas City Southern, Union Pacific, Wabash, and Milwaukee, although not technically defendants to the last-mentioned proceeding and therefore not directly subject to the orders of the commission made therein, regard themselves bound thereby and for the same reasons aforesaid conceive that they must likewise obey same in letter and spirit. Accordingly they will also prepare amendments to their tariffs which will cancel said payments at said Missouri River points from and
after July 1st, 1909, although said services are also absolutely
18 necessary and essential to them. The Great Western, owning and operating its own elevators at three of said Missouri River cities, has itself performed and now performs said services

for account of its line, but your orators believe that its receivers, likewise fearing the institution of judicial proceedings as aforesaid, will prepare a tariff for file with the commission, declaring that from and after July 1st, 1909, certain charges will be made and exacted from said members and other owners and shippers of grain, for elevating, transferring, and weighing all grain handled through said elevators, although, as aforesaid, said services are necessary and essential to the railways. All of these things will be done because, and only because, of the said unlawful order of the commission.

15. The services of elevating, transferring, and weighing of grain at said Missouri River cities are indispensably necessary and essential to all of said railways and that therefore it is the duty of said railways to either perform said services without any increase in the rates to and from said Missouri River cities, as all of said services are comprehended in said rates, or to hire others to provide the necessary facilities and instrumentalities for performing said services and to pay a reasonable compensation therefor, which your orators aver is one and one-quarter cents per hundred pounds.

16. If the said order of the commission commanding and compelling said railway companies to cease making the payments for said services from and after July 1st, 1909, is allowed to stand as a lawful order, your orators and other persons for whom this action is brought, the grain markets which have been built up through the efforts of your orators at said Missouri River cities, the individual members of the boards of trade and exchange, represented in this proceeding by your orators, will be greatly and irreparably injured and a great and irreparable loss and damage will be inflicted upon the business of your orators and the interests represented by them, and will greatly embarrass your orators and the members of said boards of trade and exchange, and each of them, in the transaction of their business.

19 17. Notwithstanding the facts above mentioned, the said commission maintains and intends to maintain and will, unless the same is enjoined or suspended by the order of this honorable court, maintain the order aforesaid as an effective order and institute, or suffer to be instituted, judicial proceedings, if necessary, to the enforcement thereof, which acts and doings of said commission are contrary to the statute and to equity and good conscience and tend to the manifest wrong and injury of your orators.

18. There are at the cities of Chicago, Illinois; Cleveland, Ohio; Cincinnati, Ohio; Louisville, Kentucky; and other cities in the territory bounded on the north by the Great Lakes, on the east by the Allegheny Mountains, on the south by the Ohio River, and on the west by the Missouri River, hereafter referred to as the "territory east of the Missouri River," corporations and voluntary associations similar to those of your orators whose volume of business and whose interest in this proceeding are similar, or substantially similar, to your orators, and who will be affected by all orders and decrees entered herein to the same extent and as fully and completely as your orators; in the said territory east of the Missouri River are a large number of rail-

way corporations engaged in the transportation of property by rail from the points named in said territory to other points in said territory and to points without said territory and to the seabord cities and from points without said territory to points within said territory and to many other points northward, eastward, and southward thereof, which transportation is conducted similarly to the transportation conducted by the railroads herein specifically named, which said railways are known and referred to as the "lines east of the Missouri River;" the said cities in the said territory east of the Missouri River, because of their geographical location, are, and have been for many years, markets for grain and other products of the farm, having large grain elevators, mills, grain exchanges, banks, and other institutions and instrumentalities necessary and convenient for conducting and maintaining general markets and distributing centers; said points in said territory east of the Missouri River are served by the said lines of railway east of the Missouri River, reaching the great grain fields of Illinois, Indiana, Michigan, Ohio, and Kentucky, and other States adjacent thereto, which said territory is a fertile grain territory, and terminating at or passing through said points or cities to eastern, southern, and foreign markets; having become large grain markets and milling centers, and having these necessary lines of railway concentrating thereat and radiating therefrom, and being in, or in close proximity to, the grain territory in the said territory east of the Missouri River, said points or cities in said territory afford and have afforded to the producers of grain good and ready markets therefor; the said corporations, individuals, and exchanges in the territory east of the Missouri River are, with reference to the said order of the commission, in the same position as your orators, and the matters and things herein charged on behalf of your orators and the railways hereinabove specifically named are matters and things which pertain to the said corporations, individuals, and exchanges at the points named in the said territory east of the Missouri River, and to the said railways east of the Missouri River, and the order of this court in restraining the enforcement of the said order of the commission is as necessary to prevent the destruction and loss of the vast properties of the members of the said corporations, individuals, and exchanges in the territory east of the Missouri River and to preserve the same as it is necessary to prevent the destruction and loss of the vast properties of your orators and to preserve the same. And while it is inexpedient and impracticable that the said corporations, individuals, and exchanges doing business at the points named in the territory east of the Missouri River should be made parties complainant to this bill of complaint, the members thereof desire the court to understand and be informed that they are directly interested in the result of the proceedings had and taken herein and the orders entered.

In consideration whereof and for as much as your orators are remediless in the premises at and by the strict rules of the common law, and are only relievable in a court of equity where matters of this nature are properly cognizable and relievable, your orators pray that

upon the filing of this bill a temporary or interlocutory order be entered herein suspending the said order of the commission
21 and restraining the enforcement thereof by said commission, and restraining said commission from taking any steps or instituting any proceedings to enforce the said order, and that upon a final hearing of this cause a decree be entered herein setting aside and annulling the said order of the commission and perpetually enjoining said commission, its members, their agents, servants, and representatives from enforcing said order and from taking any steps or instituting any proceedings for the enforcement of the same.

And your orators further aver that such other and further relief be granted in the premises as justice and equity may require and as to your honors may seem meet.

And your orators further pray that your honors grant unto your orators a writ of subpœna of the United States of America, directed to the said commission, commanding it at a certain day and under a certain penalty therein to be specified personally to be and appear before this honorable court, and then and there full, true, and complete answer make to all and singular the premises, but not under oath (an answer under oath being hereby expressly waived) and to stand to and abide by such order and decree herein as shall seem meet and agreeable to equity and good conscience.

And your orators will ever pray, etc.

GEORGE T. BELL,
Solicitor for said Complainants.

FRANK HAGERMAN,
JOHN BARTON PAYNE,
Of Counsel.

State of Missouri, County of Jackson, ss:

Charles W. Lonsdale, being first duly sworn, on oath deposes and says that he is one of the complainants herein; that he has read the said bill of complaint and knows the contents thereof, and that the allegations therein contained are true.

C. W. LONSDALE.

Subscribed and sworn to before me, a notary public in and for the County of Jackson and State of Missouri, this 16th day of December, 1908. My commission expires on the 7th day of June, 1910.

[SEAL.] E. E. BALL, *Notary Public.*

22 "EXHIBIT 1."

Before the Interstate Commerce Commission.

No. 1239.

TRAFFIC BUREAU OF MERCHANTS' EXCHANGE OF ST. LOUIS, complainant,

vs.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, DEFENDANT.

No. 1240.

TRAFFIC BUREAU OF MERCHANTS' EXCHANGE OF ST. LOUIS, complainant,

vs.

MISSOURI PACIFIC RAILWAY COMPANY, DEFENDANT.

No. 1263.

TRAFFIC BUREAU OF MERCHANTS' EXCHANGE OF ST. LOUIS, complainant,

vs.

ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY, DEFENDANT.

No. 1267.

TRAFFIC BUREAU OF MERCHANTS' EXCHANGE OF ST. LOUIS, complainant,

vs.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, DEFENDANT.

NOTE.—The language of the above petitions is the same as No. 1241, which follows, with the single exception of tariff numbers in Paragraphs IV, V, VI, VII, and VIII.

No. 1241.

TRAFFIC BUREAU OF MERCHANTS' EXCHANGE OF ST. LOUIS, complainant,

vs.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, DEFENDANT.

The petition of the above-named complainant respectfully shows:

I. That the Merchants' Exchange of Saint Louis is an association operating under the laws of the State of Missouri for the purpose to advance and promote the commercial and manufacturing interests of the city of Saint Louis; that the traffic bureau is a department of the Merchants' Exchange of Saint Louis, for the immediate purpose of looking after the commercial and manufacturing interests of the city of Saint Louis as related to the transportation interests.

II. That the above-named defendant is a common carrier engaged in the transportation of passengers and property by railroad between points in the States of Kansas and Nebraska and the city of Saint Louis, in the State of Missouri, and as such common carrier is subject to the provisions of the act to regulate commerce, approved February 4, 1887, and acts amendatory thereof or supplementary thereto.

23 III. That the above-named defendant in its charges upon grain, carloads, from points in the States of Kansas and Nebraska to the city of St. Louis, in the State of Missouri, unjustly

discriminates in favor of other grain dealers and shippers, assesses, charges, and collects from a grain dealer or shipper at Saint Louis, Missouri, a greater compensation for the transportation than it at the same time assesses, charges, and collects from other grain dealers and shippers for like transportation service, to wit:

IV. The above-named defendant has in effect a schedule of rates applying on grain, carloads, from points in Kansas and Nebraska to Omaha, Nebraska, South Omaha, Nebraska, Saint Joseph, Missouri, and Kansas City, Missouri, as shown in Chicago, Rock Island & Pacific Tariff G. F. D. No. 14153–A, I. C. C. No. C–7979, containing rates to be assessed, charged, and collected for the transportation of grain, carloads, from stations in Kansas and Nebraska to the points named.

V. The above-named defendant has in effect a schedule of rates applying upon grain, carloads, from the same points in Kansas and Nebraska to Saint Louis, Missouri, as shown in Chicago, Rock Island & Pacific Tariff G. F. D. No. 18679–A, I. C. C. No. C–6921, containing rates to be assessed, charged, and collected for the transportation of grain, carloads, from said stations in Kansas and Nebraska to Saint Louis, Missouri.

VI. The above-named defendant has in effect a schedule of rates applying upon grain, carloads, from Kansas City, Missouri, and Saint Joseph, Missouri, to Saint Louis, Missouri, as shown in Chicago, Rock Island & Pacific Tariff G. F. D. No. 18750–A, I. C. C. No. C–6918, namely, upon wheat, 9 cents per hundred pounds, and upon coarse grain, 8 cents per hundred pounds.

VII. The above-named defendant has in effect a freight tariff of elevation allowances, Chicago, Rock Island & Pacific Tariff G. F. D. No. 23266, I. C. C. No. C–8288, which provides on grain, carloads, transferred through grain elevators located at Omaha, Ne-
24 braska, South Omaha, Nebraska, and Kansas City, Missouri, said company will pay cost of transfer not to exceed three-quarters of one cent per hundred pounds when the grain is shipped over the rails of the Chicago, Rock Island & Pacific Railway Company, which allowance will be paid to elevators performing the service, and provided no other payment of this character has been made.

VIII. That, generally, the rates via the lines of the defendant above named, to Saint Louis, Missouri, the departure therefrom being exceptional, from points in Kansas and Nebraska, are, upon wheat, 9 cents per hundred pounds, and coarse grain, 8 cents per hundred pounds higher than the rates to Kansas City, Missouri, Saint Joseph, Missouri, South Omaha, Nebraska, or Omaha, Nebraska, as shown in Chicago, Rock Island & Pacific Tariff G. F. D. No. 14153–A, I. C. C. No. C–7979, and Chicago, Rock Island & Pacific Tariff G. F. D. No. 18679–A, I. C. C. No. C–6921.

IX. That in purchasing grain at points of production in the States of Kansas and Nebraska, the grain buyer and shipper at Saint Louis, Missouri, in competition with the grain buyer and shipper at Saint Joseph, Missouri, South Omaha, Nebraska, or Omaha, Nebraska, is

under the necessity of trade compelled to pay a sufficiently greater amount above the market price for grain at said named points, grades and other conditions being alike, as will represent the cost of transportation from Kansas City, Missouri, Saint Joseph, Missouri, South Omaha, Nebraska, or Omaha, Nebraska, to Saint Louis, Missouri, namely, 9 cents per hundred pounds on wheat, and 8 cents per hundred pounds on coarse grain.

X. That in purchasing grain at points of production in the States of Kansas and Nebraska, the grain buyer and shipper at Omaha, Nebraska, South Omaha, Nebraska, Saint Joseph, Missouri, or Kansas City, Missouri, pays the local rate into the Missouri River, when the grain is sold for reshipment to Mississippi River points or beyond and the grain is handled through an elevator, an allowance of three-quarters of one cent per hundred pounds is made to the elevator by said defendant railroad, which goes toward the payment of the grain dealer's or shipper's operating expense, and on such traffic the compensation received by said defendant railroad for transportation is, on wheat, 8¼ cents per hundred pounds, coarse grain, 7¼ cents per hundred pounds, while on through shipments of grain from same points of production to Saint Louis, Missouri, no contribution is made by said defendant railroad toward the operating expense of handling grain through an elevator at Saint Louis, Missouri.

XI. Section 2 of the interstate commerce act provides that

"Any common carrier, subject to the provisions of this act, who shall, directly or indirectly, by any special rate or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for service rendered * * * in the transportation of property than it charges or receives from any other person or persons in the transportation of a like kind of traffic, shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful."

Contrary to the provisions of this section the above-named defendant is transporting grain for dealers operating elevators or handling their grain through an elevator at the Missouri River points mentioned in this complaint for three-quarters of one cent per hundred pounds less than is charged and collected on grain handled by Saint Louis dealers, to whom the grain is sent on direct shipment, either by original purchase or on consignment.

XII. Section 3 of the interstate commerce act provides that:

"It shall be unlawful for any common carrier to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality * * *, or to subject any particular person, company, firm, corporation, or locality to any undue or unreasonable preference in any respect whatsoever."

The defendant above named is violating the provisions of this section when, by their rate adjustment, a greater charge is assessed for the transportation of grain forwarded from points of production in the States of Kansas and Nebraska to Saint Louis, Missouri, than

they at the same time charge for transportation purposes on shipments forwarded from same points of production to the Missouri River points and thence reshipped via said defendant's line to Saint Louis, Missouri.

26 XIII. The Interstate Commerce Commission in an administrative ruling held that where the through rates were in excess of the combination of locals between the same points, they would hold the through rates as prima facie unreasonable and the burden of proof would be upon the carrier to defend such higher through rates. These petitioners, therefore, affirm that the above-named defendant, in providing for through rates upon grain from points of production in the States of Kansas and Nebraska to Saint Louis, Missouri, for a continuous service, thus avoiding the increased cost of handling at the Missouri River, unjustly discriminates in assessing the higher transportation charge for the continuous haul, than it at the same time assesses on grain moving from the same points of production to the Missouri River points named and is reshipped to Saint Louis, Missouri. Its through rates from points of production in the States of Kansas and Nebraska to Saint Louis, Missouri, under the existing conditions, should not be in excess of the local rate to the nearest Missouri River point, plus 8¼ cents per hundred pounds on wheat and 7¼ cents per hundred pounds on coarse grain.

XIV. These petitioners further affirm that the defendant above named, in making an allowance of three-quarters of one cent per hundred pounds to an elevator or owner of grain for the transfer thereof is not required by law to make such allowance, but is prohibited by law from creating discriminations as between persons, communities, or localities in the making of such allowance.

XV. Wherefore, the petitioner prays that the above-named defendant be required to answer the charge herein, and that after due hearing and investigation an order be made commanding the defendant to cease and desist from said violations of the act to regulate commerce, and for such further order as the commission may deem equitable and necessary in the premises.

190____.

THE TRAFFIC BUREAU MERCHANTS' EXCHANGE OF SAINT LOUIS,
J. C. LINCOLN, *Commissioner.*

27 EXHIBIT 2.

ORDER.

At a general session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 29th day of June A. D. 1908.

Present: Martin A. Knapp, Judson C. Clements, Charles A. Prouty, Francis M. Cockrell, Franklin K. Lane, Edgar E. Clark, James S. Harlan, Commissioners.

No. 1239.

TRAFFIC BUREAU, MERCHANTS EXCHANGE OF ST. LOUIS, *v.* CHICAGO, Burlington & Quincy Railroad Company.

No. 1240.

SAME *v.* MISSOURI PACIFIC RAILWAY COMPANY.

No. 1241.

SAME *v.* CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY.

No. 1263.

SAME *v.* ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY.

No. 1267.

SAME *v.* MISSOURI, KANSAS & TEXAS RAILWAY COMPANY.

These cases being at issue upon complaints and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the commission having, on the date hereof, made and filed a report containing its conclusions thereon:

It is ordered, that the defendants, the Chicago, Burlington & Quincy Railroad Company, the Missouri Pacific Railway Company, the Chicago, Rock Island & Pacific Railway Company, the St. Louis & San Francisco Railroad Company, and the Missouri, Kansas & Texas Railway Company be, and they severally are hereby, notified and required to cease and desist, on or before the first day of
28 October, 1908, and for a period of at least two years thereafter abstain from giving, or paying ¾ of 1 cent per 100 pounds or any other sum as an allowance or compensation for service rendered in the elevation of grain at Kansas City, Mo., and other Missouri River points on their respective lines, or points or places in territory adjacent thereto. Tariffs withdrawing said allowance may be made effective upon thirty days' notice to the public and the Interstate Commerce Commission, given in the manner required by law, must contain the notation that they are issued under the authority hereby granted, and must refer to the titles and numbers of these cases.

Exhibit 3.

Traffic Bureau, Merchants Exchange of St. Louis, *v.* Chicago, Burlington & Quincy Railroad Company.

(Decided October 16, 1908.)

REPORT OF THE COMMISSION.

Prouty, Commissioner:

In this and four other cases heard with it the commission condemned the payment of elevation allowances upon the Missouri River and ordered the defendants to desist from that practice. The St. Joseph Board of Trade, the Atchison Board of Trade, the Kansas City Transportation Bureau of the Commercial Club, the Omaha Grain Exchange, and the Wabash Railroad Company, no one of which was a party to the original proceeding, now file petitions asking that the cases be reopened, that they be allowed to intervene, and that the matter be further investigated.

The question involved has been before the commission since 1903 and has been considered in every phase. No fact is stated in the extensive and able briefs presented in support of these petitions which was not already familiar to the commission. No argument is advanced which has not been previously presented. While these parties have not at former stages of this discussion appeared upon the record, the interests which they represent have been fully appreciated and considered. We are persuaded that no possible good could come from a further discussion of this matter, and shall therefore deny the petitions.

29 Our order in these cases runs only against points upon the Missouri River, and one ground most earnestly insisted upon by the petitioners is that to stop the granting of these allowances upon the Missouri River while they continued elsewhere would be to create a serious discrimination against that locality. This is self-evident. A cardinal consideration in reaching our conclusion was the belief that in no way could discrimination and preference be prevented except by the complete prohibition of these payments and privileges. The principle of our decision applies everywhere. We expect that the decision will be universally accepted by carriers. It is incredible that in the midst of the present demand for an increase in freight rates that any railroad can be found which will insist upon a continuance of this practice, the only effect of which upon the railroad is to deplete its revenues and demoralize its rates. If, however, this turns out to be otherwise, the commission will proceed in the most expeditious manner to enforce its ruling. If the payment of the elevator allowance, and what amounts to the same thing, the granting of free elevation, can not be prohibited everywhere, then it ought not to be prohibited upon the Missouri River.

The effective date of our order will be deferred until January 1, 1909, in order that all carriers throughout the country may have reasonable opportunity to bring their tariffs and practices into conformity with our conclusions and orders in this matter.

30 Afterwards, to wit, on the 6th day of January, 1909, an entry of appearance was filed. Said entry of appearance is in words and figures as follows:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

HARRY J. DIFFENBAUGH ET AL., COMPLAINANTS,
vs.
INTERSTATE COMMERCE COMMISSION, DEFENDANT.

ENTRY OF APPEARANCE.

The appearance of the Interstate Commerce Commission is hereby entered in above-entitled cause, consent being given to the filing of the suit in the above-named district with the same force and effect and no more than if filed in any other district.

A. S. VAN VALKENBURGH,
P. J. FARRELL,
Solicitors for Interstate Commerce Commission.

31 Afterwards, to wit, on the 25th day of January, 1909, a demurrer of the Interstate Commerce Commission was filed. Said demurrer is in words and figures as follows:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

HARRY J. DIFFENBAUGH, EDMUND D. BIGELOW, AND Charles W. Lonsdale, as officers and members of the Board of Trade of Kansas City; Omaha Grain Exchange, a corporation; St. Joseph Board of Trade, a corporation; and William S. Washer, Edwin Lukins, and Samuel E. Harburger, as officers and members of the Atchison Board of Trade,
v.
INTERSTATE COMMERCE COMMISSION.
No. 3437.

THE DEMURRER OF THE INTERSTATE COMMERCE COMMISSION.

To the honorable the Judges of the Circuit Court of the United States for the Western Division of the Western District of Missouri:

The Interstate Commerce Commission, the defendant in the above-entitled suit, by protestation, not confessing or acknowledging any

of the matters and things in the bill of complaint of the above-named complainants contained to be true in such manner and form as the same are therein set forth and alleged, demurs to the said bill. And for cause of demurrer shows:

I.

That complainants have not in and by said bill shown that this court has jurisdiction to hear or determine the questions or any of the questions of fact or of law presented to the court for hearing and determination in and by said bill.

32 II.

That said complainants have not in and by their said bill shown that they are or that any of them is entitled to institute, maintain, or prosecute before this court this suit.

III.

That the purpose and the only purpose of the institution of said suit by said complainants, as shown in and by complainants' said bill, is to procure an order of this court suspending and restraining enforcement of an order dated June 29, 1908, made and entered by defendant against the Chicago, Burlington and Quincy Railroad Company, the Missouri Pacific Railway Company, the Chicago, Rock Island and Pacific Railway Company, the St. Louis and San Francisco Railroad Company, and the Missouri, Kansas and Texas Railway Company, requiring said companies to "cease and desist on or before the 1st day of October, 1908, and for a period of at least two years thereafter abstain from giving or paying three-fourths of 1 cent per 100 pounds or any other sum as an allowance or compensation for services rendered in the elevation of grain at Kansas City, Mo., and other Missouri River points on their respective lines or points or places in territory adjacent thereto," and it appears in and by complainants' said bill that complainants have never been and are not now parties, and that none of complainants has ever been or is now a party to said order of June 29, 1908.

IV.

That it appears in and by said bill that said order of June 29, 1908, was made and entered as aforesaid by defendant in five separate proceedings instituted by the Traffic Bureau, Merchants' Exchange of St. Louis, namely, one against Chicago, Burlington and Quincy Railroad Company, another against Missouri Pacific Railway Company, another against Chicago, Rock Island and Pacific Railway Company, another against St. Louis and San Francisco

Railroad Company, and another against Missouri, Kansas and
33 Texas Railway Company, and that said complainants have never been and are not now parties, and that none of said complainants has ever been or is now a party to said proceedings or any of them.

V.

That said complainants have not in and by their said bill shown that they have ever been or are now entitled to be or be made parties, or that any of them has ever been or is now entitled to be or be made a party to the proceedings or any of the proceedings instituted by the Traffic Bureau, Merchants' Exchange of St. Louis, as aforesaid.

VI.

That said complainants have not in and by their said bill shown that they have ever been or are now entitled to be or be made parties, or that any of them has ever been or is now entitled to be or be made a party to said order of June 29, 1908, made and entered as aforesaid by this defendant.

Wherefore, and for divers other good causes of demurrer appearing in and by said bill, this defendant demurs thereto and prays the judgment of this honorable court whether defendant shall be compelled to make any answer to the said bill, and this defendant prays to be hence dismissed with its reasonable costs in this behalf sustained.

INTERSTATE COMMERCE COMMISSION,
By EDWARD A. MOSELEY,
Secretary Thereof, Thereunto Duly Authorized.
ARBA S. VAN VALKENBURGH,
United States Attorney, Kansas City, Mo.,
P. J. FARRELL,
Special Assistant United States Attorney, Washington, D. C.,
Solicitors for Interstate Commerce Commission.

34 I hereby certify that in my opinion the foregoing demurrer is well founded in point of law.

P. J. FARRELL,
Solicitor for Defendant.

WASHINGTON, *District of Columbia, ss:*

Edward A. Moseley, being first duly sworn, says on oath that he is the secretary of the Interstate Commerce Commission, the defendant in the above entitled suit, and that the foregoing demurrer is not interposed for delay.

Subscribed and sworn to before me, H. S. Milstead, a notary public in and for said District of Columbia, this 22nd day of January, 1909.

[SEAL.] H. S. MILSTEAD, *Notary Public.*

35 Afterwards, to wit, on the 15th day of February, 1909, defendant's reply to suggestions of complainants was filed. Said reply is in words and figures as follows:

In the United States Circuit Court for the Western Division of the Western District of Missouri.

HARRY J. DIFFENBAUGH ET AL., COMPLAINANTS,
v.
INTERSTATE COMMERCE COMMISSION, DEFENDANT. } No. 3437.

DEFENDANT'S REPLY TO SUGGESTIONS OF COMPLAINANTS.

1. The defendant does not understand that the *the* issues presented in the Peavey Case and in this case are the same, since in the Peavey Case the petition is brought to enforce a specific contract, while in this case it is brought to set aside an order of the defendant.

The facts are, however, the same in both cases, and the two can properly be tried together.

2. The defendant desires a judicial interpretation of this question. It would be glad to have the court entertain jurisdiction upon this petition and dispose of the matter as though brought upon the petition of a carrier against whom the order was directed. It does not, however, believe that the court can entertain such jurisdiction upon the application of these petitioners, and deems it its duty to make this objection *in limine*.

ARBA S. VAN VALKENBURGH,
P. J. FARRELL,
Solicitors for the Interstate Commerce Commission.

36 Afterwards, to wit, on the 22nd day of March, 1909, a stipulation was filed. Said stipulation is in words and figures as follows:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

HARRY J. DIFFENBAUGH, EDMUND D. BIGELOW, and Charles W. Lonsdale, as Officers and Members of the Board of Trade of Kansas City; Omaha Grain Exchange, a Corporation; St. Joseph Board of Trade, a Corporation; and William S. Washer, Edwin Lukins, and Samuel E. Harburger, as Officers and Members of the Atchison Board of Trade,
v.
INTERSTATE COMMERCE COMMISSION. } No. 3437.

The parties to the above entitled cause, by their respective solicitors, hereby stipulate and agree that, with the consent of the court,

the defendant may file an answer to the bill of complaint; that testimony may be taken, and that hearing and decision upon the demurrer heretofore filed by the defendant be postponed to the final hearing upon the merits, without prejudice to the right of the defendant to insist upon and have a hearing and decision by the court upon the demurrer in the same manner and to the same effect as though answer had not been filed, or the hearing upon the demurrer had not been postponed.

It is also prayed that the court enter an order in this cause in accordance with the terms hereof.

FRANK HAGERMAN,
Solicitors for Complainant.

A. S. VAN VALKENBURGH,
P. J. FARRELL,
Solicitors for Defendant.

37 The court consents.

(Signed) WALTER H. SANBORN,
(Signed) WILLIS VAN DEVANTER,
(Signed) ELMER B. ADAMS,
Circuit Judges.

38 Afterwards, to wit, on the 22nd day of March, 1909, the answer of the Interstate Commerce Commission was filed. Said answer is in words and figures as follows:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

HARRY J. DIFFENBAUGH, EDMUND D. BIGELOW, and Charles W. Lonsdale, as Officers and Members of the Board of Trade of Kansas City; Omaha Grain Exchange, a Corporation; St. Joseph Board of Trade, a Corporation, and William S. Washer, Edwin Lukins, and Samuel E. Harburger, as Officers and Members of the Atchison Board of Trade,

v.

INTERSTATE COMMERCE COMMISSION.

No. 3437.

THE ANSWER OF THE INTERSTATE COMMERCE COMMISSION.

The Interstate Commerce Commission, the defendant in the above-entitled cause, now and at all times hereafter, saving and reserving to itself all and all manner of benefit and advantage of exception to the many errors and insufficiencies in the complainants' said bill of complaint contained, for answer thereunto, or unto so much or such parts thereof as this defendant is advised is material for it to make answer unto, answers and says:

I.

Defendant admits the truth of the allegations contained in paragraph 1 of the bill.

II.

Answering paragraph 2 of the bill:

Defendant admits the truth of the allegations contained in paragraph 2 of the bill, except that defendant disclaims information sufficient to form a belief as to whether or not upon the faith of the establishment of the markets and elevation practices at Missouri River points, as particularly set forth in complainants' bill of complaint, the members of said boards of trade and grain exchange have invested large sums of money in building up and maintaining their respective lines of business, or whether or not upon the faith of the establishment of said markets and said elevation practices as aforesaid those of said members who are in the elevator business have spent large sums in private elevators and elevator facilities, and defendant denies that it is subject to suit as a defendant herein.

III.

Defendant admits the truth of the allegations contained in paragraph 3 of the bill.

IV.

Answering paragraph 4 of the bill:

Defendant admits the truth of the allegations contained in paragraph 4 of the bill, except that defendant alleges that the state of Iowa produces more grain annually than is produced in any other state mentioned by complainants in said paragraph 4; that the state of Illinois produces more grain annually

than is produced annually in the state of Iowa; that only a comparatively small portion of the grain produced either in the state of Iowa or in the state of Missouri is handled at any of said Missouri River cities; that a very large portion of the grain produced in Oklahoma is shipped directly through the Gulf and Atlantic ports and not handled at any of said Missouri River cities, and that practically none of the grain produced in Illinois is handled at any of said Missouri River cities. In this connection defendant shows that during the years 1903 to 1907, inclusive, the grain production of Illinois and Iowa aggregated a little more than four and one-half billion bushels, while during the same period of time the grain production of Kansas and Nebraska aggregated only a little more than three billion bushels.

V.

Answering paragraph 5 of the bill:

Defendant admits that the allegations contained in said paragraph 5 are substantially correct.

VI.

Answering paragraph 6 of the bill:

Defendant disclaims information sufficient to form a belief as to whether or not only 10 per cent of the grain handled at said Missouri River cities is consumed there, but admits that only a comparatively small portion of such grain finds its final market at said Missouri River cities. Defendant disclaims information sufficient to form a belief as to whether or not about 90 per cent of the grain handled at said

Missouri River cities is purchased by members of said boards of trade and said exchange, shipped to them at said cities and there treated, cleaned, mixed, clipped, weighed, and possibly stored for a time and then reshipped to other markets east, north, and south of said cities for consumption at said markets or further shipment therefrom to other points in the United States or to foreign countries, but defendant admits that a very large portion of such grain is so treated, cleaned, mixed, clipped, weighed, and stored and so reshipped. Defendant admits that the movement of grain from the large producing territory aforesaid is not constant and regular throughout the year, but is largely confined to comparatively short seasons —that is to say, a few months of each year, depending more or less upon the size of the crop and the range of obtainable prices. Defendant admits that during the grain-shipping season there is a pressing demand for cars, particularly when market conditions tend to stimulate prices, and that it is a fact and a matter of common knowledge that a few years previous to October, 1907, were exceptionally prosperous in all lines of trade, and that during said years traffic of all kinds was offered for transportation in unprecedented volumes; that although the railway companies whose lines reach the Missouri River and other railway companies serving the aforesaid territory in common with other railway companies made large additions to their car and locomotive equipment, said railway companies were frequently unable to meet the requirements of the shipping public; that the growth

of the traffic during said time exceeded the transportation facilities, and that during said times the seasons when shippers were faced with so-called car famines were frequent; admits that years ago this question began to receive serious consideration by said railway companies, and that during said time it was desirable for those lines of railway having eastern termini at said Missouri River cities to keep their cars on their own lines instead of allowing them to go beyond said cities in order to carry to distant destinations the grain originating on their lines, as by so doing said equipment passed beyond their control and was absent for varying and uncertain periods; but defendant denies that during said time the railway companies whose lines run through said Missouri River cities were in somewhat the same position; that is, that they could not conveniently allow their cars to run through to their far distant termini, because if they did too much time would be consumed in returning said equipment to the producing fields for further loading. In this connection, however, defendant alleges that the carriers whose lines of railway reach the Missouri River were during said time in a position similar to the position of other large railway systems, and that, generally speaking, since October, 1907, all carriers have had at all times sufficient cars and other equipment to accommodate the business of their patrons. Defendant admits that in the past the loading of cars at country stations has at times been comparatively light, and that the economical movement

of grain for the long distance it is carried when it originates west of the Missouri River and is transported to markets east of said river requires comparatively heavy loading, but denies that such light loading was made necessary by conditions at points of origin, and denies that said comparatively heavy loading could not ordinarily be secured at local stations on initial lines. Defendant denies that said railways provided for the transfer of grain from the initial cars to other cars at said Missouri River cities for the purpose of meeting the various situations described by complainants in said paragraph 6, brought about by competition and operating conditions; denies that said Missouri River cities were selected as points where such transfer should be made because of their geographical location and because the eastern and western termini of so many of the railways aforesaid were at said Missouri River cities, and disclaims information sufficient to form a belief as to whether or not said termini were located at said Missouri River upon the faith of said cities being great market points.

However, defendant admits and alleges that such transfer was brought about largely, if not entirely, by a desire on the part of the Union Pacific Railroad Company and other carriers whose lines of railway reach said Missouri River cities and penetrate the grain-producing territory west of the Missouri River to retain upon their lines of railway west of said river their own cars. Defendant admits that at first such transfer was effected by shovel from car to car,

the loaded car being switched upon a track elevated about 3 or 4 feet above and adjoining a track where the empty car into which the grain was to be shoveled or transferred was placed, and admits that for the most part this method of transfer was finally abandoned in favor of transfer through grain elevators, but defendant disclaims information sufficient to form a belief as to whether or not the shovel transfer consumed much time or entailed loss of grain. In this connection defendant alleges that such change in method of transfer was brought about by competition between carriers having lines of railway extending to and from said Missouri River cities.

VII.

Answering paragraph 7 of the bill:

Defendant admits that the published tariffs issued by the railroads traversing said territory provide for the charging and collecting of rates on the grain transported as aforesaid on the basis of so much per 100 pounds, and admits that to ascertain the total charges on a carload of grain it is necessary to provide facilities for securing the correct weights of all carloads transported; admits that grain is carried in bulk in ordinary box cars and that said cars are the same as those used for miscellaneous freight, but disclaims information sufficient to form a belief as to whether or not a loss in transit through leakage is not infrequently sustained; admits that proper and adequate weighing facilities are essential to carriers for the purpose of checking and verifying claims made by

shippers in connection with alleged loss of traffic while in transit, but defendant alleges that such facilities are no more necessary in connection with the transportation of grain than in connection with the transportation of other traffic. Defendant admits that such weighing facilities were at first provided by installing track scales upon which the loaded cars were switched and weighed and alleges that such facilities still exist and are used daily by the carriers mentioned by complainants in their bill of complaint and by other carriers. Defendant disclaims information sufficient to form a belief as to whether or not, although the carriers endeavored to keep said scales tested, the scales, on account mostly of climatic conditions, were incorrect a large part of the time, or whether or not the tare weight of loaded cars as determined by said scales was frequently inaccurate because the "light" weight, as stenciled on the side of a car when new, was not changed often enough to always record the correct weight of the empty car. Defendant denies that it is often necessary to repair cars for the loading of grain by putting in new doors and strengthening the sides, although defendant admits that such repairs are occasionally necessary, but alleges that the repairs are no more necessary in connection with the loading of grain than in connection with the loading of other traffic. Defendant admits that such repairs may and sometimes do change the weight of empty cars, but denies that such change takes place often, and denies that when such change occurs and no corresponding change is

made in the weight stenciled on the sides of the cars, proper weights upon which to assess freight charges and verify claims can not be secured. In this connection defendant alleges that such weights may be secured by weighing the car before it is loaded and again after it is loaded, on track scales owned and operated by carriers and used by them in connection with the transportation of grain and other traffic. Defendant denies that the practice of weighing grain on track scales has been abandoned, or that the plan of weighing grain on hopper scales in grain elevators has been universally adopted, or that such plan is an essential part of the method of handling and transporting grain, so far as relates to the transportation of the grain, or that the abandonment of such plan would demoralize the grain trade or render weights uncertain or greatly increase the cost of handling all kinds of grain, so far as such cost relates to the transportation of the grain.

VIII.

Answering paragraph 8 of the bill:

Defendant disclaims information sufficient to form a belief as to whether or not three plans were suggested and adopted by said railways to provide said grain elevators with which to properly and expeditiously transfer at Missouri River cities the grain from the cars of the initial carriers to cars of the carriers which were to transport said grain to final destination and by means of hopper scales in said elevators to ascertain the correct weights upon which to assess freight charges and verify shippers' claims

in the event of loss in transit. Defendant admits that some of said railways erected grain elevators at one or more of said Missouri River cities and then leased them, but disclaims information sufficient to form a belief as to whether or not such elevators were leased for valuable consideration to certain of the members of said boards of trade and said exchange who furnished the employees and kept the machinery and appliances in repair and in other ways incurred expense in the operation of the elevators. Defendant admits that for a few years said railways paid to those who operated the elevators 1¼ cents per 100 pounds and subsequently paid to such operators ¾ of a cent per 100 pounds upon all grain transferred through said elevators. Defendant admits that one of said railways having its western termini at said Missouri River cities, namely, the Chicago Great Western Railway Company, in order to meet the competition of other lines in providing proper and adequate instrumentalities for transferring and weighing grain, erected its own elevators at three of said Missouri River cities and with its own employees operated and still operates said elevators. Defendant disclaims information sufficient to form a belief as to whether or not still other of said railways serving one or more of said Missouri River cities encouraged certain of the complainants herein to erect grain elevators upon the lines of such railways at said Missouri River points and in effect agreed by the publication of proper tariffs filed with defendant to pay to any and all persons operating grain elevators for

a long period 1¼ cents per 100 pounds and subsequently ¾ of a cent per 100 pounds for the service of transferring and weighing grain handled by said railways, but defendant admits that tariffs of said carriers providing for the payment during a few years previous to June 1, 1907, of 1¼ cents per 100 pounds for transferring grain through elevators at said Missouri River cities and providing for the payment subsequent to said date of ¾ of a cent per 100 pounds for transferring grain through said elevators, were filed with defendant.

IX.

Answering paragraph 9 of the bill:

Defendant denies that the services of weighing, elevating, and transferring grain at said Missouri River cities were or are absolutely essential to the railways serving said Missouri River cities; admits that the service of weighing is performed in connection with elevation in said elevators, but denies that such weighing in elevators is necessarily incident to the assessment of freight charges or the verification of claims. Defendant admits that weights so determined are to a large extent used in connection with the assessment of freight charges, but disclaims information sufficient to form a belief as to whether or not weights so determined are used in connection with the verification of claims, and denies that said services of elevation and transfer are necessary on account of operating and competitive conditions peculiarly obtaining at said Missouri River cities over which said

carriers have no control. Defendant admits that the use of modern grain elevators for the performance of said transfer services is a convenience to said railways in that, when the grain is transferred by means of shovels, it is advisable to switch the cars containing the grain to tracks constructed as aforesaid, and when the grain is weighed upon track scales it is necessary to switch the cars to tracks where such scales are located which may be some distance from the tracks where the grain is transferred; but defendant denies that for these reasons or any other reasons the use of modern grain elevators by carriers is necessary. In this connection defendant alleges that such transfer at said Missouri River cities is not now necessary; that modern grain elevators are erected for the convenience of grain dealers and equipped with machinery and other appliances used in connection with services in inspecting, clipping, cleaning, mixing, and otherwise treating grain, which services are not a benefit to said carriers or necessary in connection with the transportation of the grain by such carriers, and that the cost of erecting an elevator like those above mentioned is much greater than would be the cost of erecting an elevator simply and solely for the purpose of use in connection with the transfer of grain from car to car. Defendant denies that by the use of modern grain elevators said carriers have been and are now enabled to have the weighing and transfer service performed by one movement of the cars instead of two. In this connection defendant alleges that where grain is transferred

through an elevator a car to be unloaded must first be placed upon the elevator track and afterwards the car into which the grain is reloaded must be so placed. Defendant disclaims information sufficient to form a belief as to whether or not congestion and delay in railway yards which obtain during grain-shipping seasons are diminished and relieved by the use of elevators in connection with such transfer, or whether or not said complainants who are now operating grain elevators have invested many thousands of dollars in providing facilities for such transfer, relying in good faith upon the matters and things alleged by complainants in their bill of complaint, or whether or not said carriers were prompted by such matters and things to make arrangements with complainants for the erection and operation of grain elevators, or whether or not complainants desire to continue to perform for said carriers said transfer service for the compensation hereinbefore mentioned, although defendant is willing to admit that such desire exists, but defendant denies that complainants are entitled to have continued for such compensation said services.

X.

Answering paragraph 10 of the bill:

Defendant disclaims information sufficient to form a belief as to whether or not in making large investments members of said boards of trade and said exchange operating grain elevators relied upon the practice and representations of the carriers mentioned by complainants in said bill of complaint or

upon the establishment of markets at said Missouri River, as aforesaid, or upon certain acts of defendant and of the Congress upon the subject concerning which complainants make statements in said paragraph 10. Defendant admits that in July, 1902, defendant of its own motion made written inquiry concerning the arrangement under which at two of said Missouri River cities, namely, Kansas City, Kans., and Council Bluffs, Iowa, the service of transferring grain was furnished to the Union Pacific Railroad Company, hereinafter called the Union Pacific, by Frank H. Peavey & Co., hereinafter called the Peavey Company, but took no further action at that time with reference thereto. Defendant alleges that the services so performed were performed by the Omaha Elevator Company and the Midland Elevator Company under a contract entered into by and between Frank H. Peavey and the Union Pacific Railroad Company; that said Frank H. Peavey was, at the time said contract was so executed, namely, on February 7, 1899, and continued to be thereafter until his decease, in 1901, senior member of the firm of Frank H. Peavey & Co., and that subsequent to the execution of said contract as aforesaid said Frank H. Peavey, with the consent of the Union Pacific, transferred his interest in said contract to said Omaha Elevator Company; that at the time written inquiry was made as aforesaid by defendant said Peavey & Co. was, has since continued to be, and now is the virtual owner of the business of said Omaha Company and said Midland Com-

pany, because during all said times said Peavey & Co. has owned and now owns a majority of the stock and has conducted during all said times and now conducts the business of said Omaha Company and said Midland Company in connection with and as incident to the business of said Peavey & Co.; that during all said times said service of transferring grain for the Union Pacific was performed at Council Bluffs, Iowa, by the Omaha Company, and at Kansas City, Kans., by the Midland Company, but defendant disclaims information sufficient to form a belief as to whether or not the transfer services so furnished were furnished for a valuable consideration. Defendant admits that on May 7, 1903, defendant, pursuant to complaint filed in its office by one or more carriers in competition with the Union Pacific, made an order of inquiry, recorded as upon its own motion, into the validity of and practice under said contract; admits that the Union Pacific and the Peavey Company appeared, and alleges that the Omaha Company and the Midland Company also appeared, and admits and alleges that each of them, among other things, contended that defendant had no jurisdiction and could therefore make no order relative to said contract or arrangement, because said transfer service was but an incident to as distinguished from interstate commerce itself, but denies that said contract in terms included the elevation or weighing of grain. Defendant admits that after full hearing and submission of extended printed and oral arguments by counsel of carriers, defendant on

June 25, 1904, made a report which included defendant's findings of fact, opinion, and order in the premises. Defendant alleges that at said hearing the Omaha Company and the Midland Company aforesaid were represented by counsel. Said report is attached hereto as Exhibit 1, and hereby made a part of defendant's answer to said bill. Defendant denies that in said opinion defendant found and declared among other things the facts stated in subdivisions a, b, c, and d of said paragraph 10, although defendant admits that some of the facts stated in said subdivisions are included also in defendant's said Exhibit 1. In this connection, therefore, defendant refers the court to the language of said Exhibit 1.

Defendant admits that in its report in 1905 defendant made recommendations concerning amendments to the act to regulate commerce substantially as stated by complainants. In this connection, however, defendant alleges that the word "performance" which appears in the twelfth line of page 17 of complainants' bill of complaint should be "preference." Defendant admits that pursuant to invitation from the congressional committee defendant's members appeared before that committee and urged that the law be amended in accordance with such recommendations. Defendant also admits that the Congress responded to defendant's request by passing the amendment of June 29, 1906, known as the "Hepburn Act," and that said amendment included

provisions as stated by complainants in the third subdivision of said paragraph 10.

Answering the last subdivision of said paragraph 10, defendant denies that in the light of the previous history of defendant's investigations it is manifestly apparent that Congress desired said provisions of the Hepburn Act to be applicable to the situations explained by complainants in their said bill, and to permit those furnishing services to carriers to be paid reasonable compensation therefor, except that the Congress provided that if such services were so furnished the compensation to be paid therefor should not be more than was just and reasonable, and authorized defendant after hearing on complaint to determine the reasonable charge to be paid as a maximum by the carrier for such service and fix the same by appropriate order. Defendant disclaims information sufficient to form a belief as to whether or not many of the members of said boards of trade and said exchange were acquainted with said investigations and subsequent legislation with respect to said services, and either themselves thereafter erected grain elevators or entered into arrangements with some of the above-named railways to lease elevators erected by them, while still others relying in good faith upon the matters described by complainants in their bill of complaint, and upon declarations in tariffs of the railways mentioned in said bill that the performance of said service would be paid for by them, invested large sums of money in erecting many other elevators.

XI.

Answering paragraph 11 of the bill:

Defendant admits that after the passage of the amendatory act aforesaid and in July, 1906, pursuant to complaints received by defendant from interested parties, including carriers competing with the Union Pacific, defendant ordered said case involving the Peavey contract reopened for further evidence and argument, and that after due notice to interested parties a second hearing was had, further proofs adduced, and additional oral and printed argument submitted, and that upon April 9, 1907, an order was entered by defendant against the Union Pacific Railroad Company in words and figures as follows:

> *It is ordered*, That the Union Pacific Railroad Company be, and it is hereby, notified and required to cease and desist on or before the 1st day of June, 1907, and for a period of at least two years thereafter abstain, from giving or paying 1¼ cents per 100 pounds as and for an allowance or compensation for service rendered in the transfer, release of car equipment, or elevation of grain at Council Bluffs, in the State of Iowa, or Kansas City, in the State of Missouri, or points or places in territory adjacent thereto, to any person, firm, association, company, or corporation, directly or indirectly, engaged or interested in the buying, selling, or shipment of grain, or to any elevator company or corporation owned in whole or in part, or in anywise, directly or indirectly, controlled by one or

more such persons, firms, associations, companies, or corporations so engaged or interested, directly or indirectly, in the buying or selling of grain; and more particularly to so cease and desist from giving or paying such allowance to the Omaha Elevator Company, the Midland Elevator Company, or to Peavey & Co.; and to further cease and desist at the time and for the period aforesaid from giving or paying any allowance or compensation for such service in excess of ¾ of a cent per 100 pounds of grain to said Omaha Elevator Company, the Midland Elevator Company, or to Peavey & Co., or to any person, firm, association, company, or corporation, directly or indirectly, engaged or interested in the buying, selling, or shipment of grain at the places aforesaid or adjacent thereto, or to any elevator company or corporation owned in whole or in part, or directly or indirectly controlled, by one or more persons or corporations engaged or interested, directly or indirectly, in the buying, selling, or shipment of grain.

Defendant denies that said order was entered against Peavey & Co. and its subsidiary companies, or that in said order it was declared that under the law as amended it was the duty of the carrier to furnish such transfer and elevation services, or that such duty could be performed by paying the shipper for the performance thereof, or that 1¼ cents per 100 pounds was in excess of the actual cost, or that such payment should be treated as unlawful to the extent of such excess, but defendant admits that

in and by said order the Union Pacific was required to cease and desist from giving or paying any allowance or compensation for services rendered in the transfer, release of car equipment, or elevation of grain at Council Bluffs or Kansas City "in excess of ¾ of a cent per 100 pounds of grain to said Omaha Elevator Company, the Midland Elevator Company, or to Peavey & Co., or to any person, firm, association, company, or corporation directly or indirectly engaged or interested in the buying, selling, or shipment of grain at the places aforesaid or adjacent thereto or to any elevator company or corporation owned in whole or in part, or directly or indirectly controlled by one or more persons or corporations engaged or interested, directly or indirectly, in the buying, selling, or shipment of grain." Defendant admits that in its report of said second hearing issued on said April 9, which report is marked "Exhibit 2" and hereto attached and hereby made a part of this answer, defendant found that the allowance of 1¼ cents per 100 pounds was in excess of the actual cost of the transfer service and held that such payment should be treated as unlawful to the extent of such excess, but denies that defendant did not find the former payment of 1¼ cents per 100 pounds unreasonable. In this connection defendant calls attention to the language used by defendant, as shown by said Exhibit 2, which is as follows:

> Granting, then, that the allowances were not shown to be excessive on the prior investigation, do they now appear to be un-

> reasonable in the light of the facts and circumstances disclosed upon rehearing? This question we are constrained to answer in the affirmative, and to hold that enough has been shown to call for a material reduction. (Defendant's Exhibit 2, p. 76.)

Defendant admits that in pursuance of said order of April 9, 1907, the Union Pacific amended its tariffs, reducing to ¾ of a cent per 100 pounds, the payment to be made for transferring grain at Council Bluffs and Kansas City, and that corresponding changes were made in the tariffs of other carriers serving and having lines of railway running to and from said Missouri River cities. Defendant disclaims information sufficient to form a belief as to whether or not, upon the faith of defendant's holding in said report of April 9, 1907, members of said boards of trade and said exchange invested much additional money in providing and maintaining elevator properties and facilities, or whether or not much money was expended in the grain business at said Missouri River cities in conforming business and practices to the decisions of defendant hereinbefore mentioned; but defendant denies that by reason of said decisions payment by the railways for the services of elevating, weighing, and transferring grain became a necessary element in the conduct of the grain business and maintenance of the markets at said Missouri River cities, and denies that if deprived of such payment said Missouri River cities will be greatly impaired as markets.

XII.

Answering paragraph 12 of the bill:

Defendant admits that late in 1907, that is, during the latter part of August and the first part of September of that year, complaints were filed with defendant by the Traffic Bureau Merchants' Exchange of St. Louis against the Burlington, Missouri Pacific, Rock Island, Frisco, and Missouri, Kansas & Texas, but denies that in said complaints said traffic bureau in effect requested defendant to order said railways to cease and desist from making payment of anything to elevator operators operating elevators at said Missouri River cities. On the contrary, defendant alleges that in and by said complaints said traffic bureau requested defendant to order said railways to cease and desist from violating sections 2 and 3 of the act to regulate commerce by exacting and retaining from grain dealers located at and doing business in St. Louis, Mo., for the through transportation of grain to that point from points in the states of Kansas and Nebraska, rates of transportation greater in each instance than the aggregate rates per hundred pounds contemporaneously exacted and retained by said railways from competitors of said grain dealers located at and doing business in said Missouri River cities for transporting grain from said shipping points in Kansas and Nebraska to said Missouri River cities and from said Missouri River cities to said St. Louis, where the grain was transferred through elevators at said Missouri River cities.

In this connection, defendant alleges that in and by said complaints said Traffic Bureau showed that in each instance the through rates from said shipping points in Kansas and Nebraska to St. Louis were the same as the sum of the rates to and from said Missouri River cities, that is, the rates from said shipping points to the Missouri River cities added to the rates from said Missouri River cities to St. Louis, but that where the grain was shipped by said competitors, as aforesaid, to and from the Missouri River cities and transferred by said competitors through elevators at the Missouri River cities, said railways refunded to said competitors ¾ of a cent per 100 pounds, while no such refund was made, nor was any refund made by said railways to the grain dealers located at and doing business in St. Louis on the through shipments above described. Defendant denies that Exhibit 1 to complainants' bill of complaint is "copies" of the complaints filed as above by said traffic bureau, but defendant admits that said Exhibit 1 is a copy of one of said complaints, and in substance the same as each of the other complaints, and defendant alleges that the prayer of the complaint which is Exhibit 1 to complainants' bill of complaint, reads as follows:

> Wherefore, petitioner prays that the above-named defendant be required to answer the charge herein, and that after due hearing and investigation an order be made commanding defendant to cease and desist from said violations of the act to regulate commerce, and for

such further order as the Commission may deem equitable and necessary in the premises.

Defendant admits that none of the complainants herein was a party to any of the proceedings instituted before defendant by said traffic bureau as aforesaid, but disclaims information sufficient to form a belief as to whether or not complainants were notified of the pendency of such proceeding. In this connection, however, defendant alleges that grain dealers located at and doing business in said Missouri River cities are, through officers of said boards of trade and said exchange, kept constantly informed as to proceedings instituted before defendant and investigations made by defendant concerning matters which affect or may affect said grain dealers or the interests of said Missouri River cities. Defendant admits that in due time answers to the complaints so filed by said traffic bureau were made to defendant by the railway companies named as defendants therein and that a formal hearing was thereafter had in said proceedings, where representatives of said railway companies appeared and were examined as witnesses by a representative of said Traffic Bureau and by defendant, but defendant disclaims information sufficient to form a belief as to whether or not complainants had notice of such hearing. Defendant admits that said witnesses testified that the refund of $\frac{3}{4}$ of a cent per 100 pounds referred to by defendant in this paragraph was made at said Missouri River cities by the railway com-

panies who were defendants in said proceedings on account of actual and controlling competition, and defendant alleges that said witnesses explained that such competition was created by payments made as aforesaid by the Union Pacific Railroad Company under said Peavey contract for transferring grain through elevators at Council Bluffs and Kansas City. Defendant admits that on June 29, 1908, defendant rendered its decision in said proceedings and entered its final order in the premises, and that complainants' Exhibit 2 is a copy of said order, but defendant denies that in said decision defendant disregarded the statute enacted by the Congress in response to the recommendation of defendant as aforesaid, and held that, regardless of the reasonable value of the service and the necessity therefor, there should be no payment for the elevation and transfer service, and denies that in said order the carriers who were defendants in the proceedings aforesaid were prohibited from making any payment for the rendering of said service at said Missouri River cities. Defendant admits that the effective date of said order was originally October 1, 1908, that said date was afterwards changed to December 1, 1908, and again changed to July 1, 1909, and alleges that after the change to December 1, 1908, and previous to the change to July 1, 1909, the effective date of said order was changed to January 1, 1909, but defendant denies that such changes were made solely upon or by reason of applications of complainants,

although defendant admits that subsequent to said October 1 complainants were informed of the aforesaid proceedings and said order.

In connection with the allegations contained in paragraph 12 of complainants' bill and defendant's answer to said allegations defendant calls attention to the report and order of defendant in said proceedings dated June 29, 1908, and to three modifications of said order dated, respectively, August 18, 1908, October 23, 1908, and November 25, 1908, and to a report of defendant dated November 25, 1908, which are hereto attached, marked, respectively, "Exhibit 5," "Exhibit 6," "Exhibit 7," "Exhibit 8," and "Exhibit 9," and hereby made a part of this answer.

XIII.

Answering paragraph 13 of the bill:

Defendant admits that on or about September 26, 1908, that is, on October 5, 1908, parties representing complainants filed with defendant petitions to reopen the cases instituted by the Traffic Bureau Merchants' Exchange of St. Louis as aforesaid; admits that said petitions were supported by briefs prepared by counsel, and that in said petitions and briefs it was claimed among other things that the order of defendant which is the subject-matter of this suit was unjust and improperly made; that even upon the theory adopted said order was discriminatory against complainants, who were doing business at said Missouri River cities, in that the payments prohibited by said order were pro-

hibited at said Missouri River cities, but not elsewhere, and that the services for which the payments were made were essential to the carriers. Defendant admits that notwithstanding the filing as aforesaid of said petitions and briefs defendant, upon October 16, 1908, rendered its final decision in the premises refusing to reopen the case and confirming its former order making it unlawful for carriers to pay "¾ of 1 cent per 100 pounds or any other sum as an allowance or compensation for services rendered in the elevation of grain at Kansas City, Mo., and other Missouri River points on their respective lines or points or places in territory adjacent thereto," and defendant admits that complainants' Exhibit 3 is a copy of said decision. Defendant denies that said decision of October 16, 1908, undertook to direct or order carriers other than those who were parties to the case in which said decision was rendered to cease and desist from making payments as aforesaid, except that defendant in the decision said:

> The principle of our decision applies everywhere. We expect that the decision will be universally accepted by carriers. It is incredible that in the midst of the present demand for an increase in freight rates any railroad can be found which will insist upon a continuance of this practice, the only effect of which upon the railroad is to deplete its revenues and demoralize its rates. If, however, this turns out to be otherwise, the Commission will proceed in the most expeditious manner to enforce its

ruling. If the payment of the elevator allowance and, what amounts to the same thing, the granting of free elevation can not be prohibited everywhere, then it ought not to be prohibited upon the Missouri River.

Defendant admits that defendant finally extended the effective date of said order to July 1, 1909, and that the language of defendant in connection with the making of such extension was as stated by complainants in paragraph 13 of their bill of complaint.

Defendant admits that in and by the act entitled "An act to regulate commerce," approved February 4, 1887, and the acts amendatory thereof or supplementary thereto the powers and duties of defendant are specifically defined and prescribed. Defendant denies that it has no power or authority under said act either expressly or by implication to prescribe that common carriers may not furnish facilities for the weighing, transferring, or elevating of grain. On the contrary, defendant alleges that it has full power and authority under said act to prohibit the furnishing of such facilities to the extent that they are furnished in such a manner as to produce discriminations forbidden by said act. Defendant denies that no power or authority is contained in said act either expressly or by implication to justify the order which is the subject-matter of this suit, prohibiting the rendition of services or the making of payments therefor to complainants and others similarly situated for rendering such services to the extent that said order constitutes such a prohibition. Defendant denies that

said order is null and void or of no validity whatever, or that defendant was or is without power or authority in law to make the same or to enforce the same, or that defendant exceeded its powers or was without jurisdiction in that behalf, or that said decision and said order are or that either of them is contrary to law or in violation of the Constitution of the United States, in that the effect of the enforcement of said order is to deprive complainants and all others similarly situated of their property without due process of law or to deprive them of the equal protection of the law, or that said order is a restraint upon the liberty of contract, or of making lawful contracts, with railroad companies and receiving payments for services rendered or payment for property, necessary and legal facilities actually furnished for the weighing, elevating, and transfer of grain, and denies that said order and decision impair, or that either of them impairs, the application of existing legal and binding contracts of complainants' members and members of other corporations, voluntary associations, and individuals on whose behalf the bill of complaint is filed. On the contrary, defendant alleges that said decision and order are and that each of them is in every respect proper, just, and lawful.

XIV.

Answering paragraph 14 of the bill:

Defendant disclaims information sufficient to form a belief as to whether or not acting in response to the order which is the subject-matter of this suit

prohibiting certain payments at said Missouri River cities, the Burlington, Missouri Pacific, Rock Island, Frisco, and Missouri, Kansas & Texas, conceiving that they are bound by said order and fearing that the Commission will, if necessary, institute judicial proceedings to enforce same, will obey said order and prepare amendments to their tariffs providing for said payments at said Missouri River cities which will declare that, beginning on July 1, 1909, no such payments will be made to elevator owners or operators for performing the services to which said order relates, and defendant disclaims information sufficient to form a belief as to whether or not other railway companies, namely, the Santa Fe, Alton, Northwestern, Illinois Central, Kansas City Southern, Union Pacific, Wabash, and Milwaukee, although not technically defendants in the proceedings to which said order relates, and therefore not directly subject to said order, regard themselves bound thereby, and conceive that they must obey same in letter and spirit, or whether or not they will prepare amendments to their tariffs which will cancel said payments at said Missouri River points from and after July 1, 1909, and defendant disclaims information sufficient to form a belief as to whether or not the Great Western, which owns and operates elevators at three of said Missouri River cities and has performed and now performs for account of its line the services to which said order relates, has receivers who, fearing the institution of judicial proceedings, will prepare and file with defendant a tariff declaring

that from and after July 1, 1909, certain charges will be made and exacted from members of said Boards of Trade and said Exchange and other owners and shippers of grain for elevating, transferring, and weighing all grain handled through said elevators, but defendant denies that said order is unlawful or that the services to which said order relates are necessary or essential to the carriers mentioned by complainants in paragraph 14 of their bill of complaint. In connection with the allegations contained in said paragraph 14, defendant alleges that unless restrained therefrom by competent authority it will enforce compliance with the terms of the order mentioned in said paragraph.

XV.

Answering paragraph 15 of the bill:

Defendant denies that the services of elevating, transferring, and weighing of grain at said Missouri River cities are necessary or essential to the railways mentioned by complainants in their bill of complaint, or that it is the duty of said railways to either perform said services without any increase in the rates to and from said Missouri River cities or to hire others to provide the necessary facilities or instrumentalities for performing said services and to pay a reasonable compensation therefor. Defendant denies that a reasonable compensation for said services is 1¼ cents per 100 pounds of grain transferred through the elevators, and also denies that said services are comprehended in said rates.

XVI.

Answering paragraph 16 of the bill:

Defendant denies that if said order is allowed to stand as a lawful order complainants or other persons for whom this suit is brought, or the grain markets which have been built up through the efforts of complainants at said Missouri River cities or the individual members of said Boards of Trade or said Exchange represented in this suit by complainants will be greatly or irreparably injured or that a great or irreparable loss or damage will be inflicted upon the business of complainants or the interests represented by them or that complainants or the members of said boards of trade and said exchange or any of them will be greatly embarrassed in the transaction of their business.

XVII.

Answering paragraph 17 of the bill:

Defendant admits that it maintains and intends to maintain and will, unless the same is enjoined or suspended by an order of this honorable court, maintain the aforesaid order as an effective order, and institute or suffer to be instituted judicial proceedings if necessary to the enforcement thereof, but denies that such acts and doings are or would be contrary to the statute or to equity and good conscience or tend to the manifest wrong or injury of complainants.

XVIII.

Answering paragraph 18 of the bill:

Defendant admits that there are at the cities of Chicago, Ill.; Cleveland, Ohio; Cincinnati, Ohio; Louisville, Ky.; and other cities in the territory bounded on the north by the Great Lakes, on the east by the Allegheny Mountains, on the south by the Ohio River, and on the west by the Missouri River, hereafter referred to as the territory east of the Missouri River, corporations and voluntary associations similar to those of complainants, but disclaims information sufficient to form a belief as to whether or not the volume of business of such corporations and voluntary associations or their interest in this suit is similar or substantially similar to the business or interest of complainants or whether or not said corporations and voluntary associations will be affected to the same extent and as fully and completely as complainants will be affected by all orders and decrees entered herein. Defendant admits that in said territory east of the Missouri River are a large number of railway corporations engaged in the transportation of property by rail from the points named in said territory to other points in said territory and to points without said territory and to the seaboard cities and from points without said territory to points within said territory and to many other points northward, eastward, and southward thereof; which transportation is conducted similarly to the transportation

conducted by the railroads specifically named in complainants' bill of complaint which said railways are known and referred to as the lines east of the Missouri River; admits that the said cities in the territory east of the Missouri River because of their geographical location are and have been for many years markets for grain and also products of the farm, having large grain elevators, mills, grain exchanges, banks, and other institutions and instrumentalities necessary and convenient for conducting and maintaining general markets and distributing centers; admits that said points in said territory east of the Missouri River are served by the said lines of railway east of the Missouri River reaching grain fields of Illinois, Indiana, Michigan, Ohio, and Kentucky and other States adjacent thereto, which said territory is a fertile grain territory, and terminating at or passing through said points or cities to eastern, southern, and foreign markets, and admits that having become large grain markets and milling centers and having these necessary lines of railway concentrating thereat and radiating therefrom and being in or in close proximity to the grain territory in said territory east of the Missouri River, said points or cities in said territory afford and have afforded to the producers of grain good and ready markets therefor, but defendant disclaims information sufficient to form a belief as to whether or not said corporations, individuals, and exchanges in the territory east of the Missouri River are, with reference to the said order of defendant, in the same position

as complainants or whether or not the matters and things charged by complainants in their bill of complaint on their behalf and on behalf of the railways specifically named by complainants in said bill are the matters and things which pertain to the said corporations, individuals, and exchanges at the points named in the said territory east of the Missouri River and to the said railways east of the Missouri River or whether or not an order of this court in restraining the enforcement of said order is as necessary to prevent the destruction and loss of the vast properties of the members of said corporations, individuals, and exchanges in the territory east of the Missouri River and to preserve the same as it is necessary to prevent the destruction and loss of the vast properties of complainants and to preserve the same, but defendant denies that such an order of the court is necessary for said purposes or any of them. Defendant admits that it is inexpedient and impracticable, and alleges that it would be improper, to make said corporations, individuals, and exchanges doing business as aforesaid at the points named in the territory east of the Missouri River parties to the bill of complaint in this suit, but disclaims information sufficient to form a belief as to whether or not said individuals and the members of said corporations and exchanges desire the court to understand and be informed that they are directly interested in the result of this suit or any order or orders which may be entered therein.

Defendant further alleges that the order of June 29, 1908, which is the subject-matter of this suit, was made and entered by defendant under facts, circumstances, and conditions which are as follows:

On June 25, 1904, after investigation had pursuant to complaint made by interested common carriers, charging that the payment of 1¼ cents per 100 pounds by the Union Pacific to Peavey & Co., or corporations owned and controlled by that firm, under said contract of February 7, 1899, for the transfer of grain through elevators of the latter at Council Bluffs and Kansas City, gave to Peavey & Co., who were dealers in and shippers of grain, undue preference and advantage and subjected other shippers to undue prejudice and disadvantage, defendant dismissed said complaint.

As a result of said investigation, defendant found that no shipper had made complaint in the premises; that the good faith of the Union Pacific in entering into said contract had not been impeached; that it was a benefit to the Union Pacific to have the grain transferred from its cars to the cars of its connections at Council Bluffs and Kansas City, because the Union Pacific was thereby enabled to retain and use its cars on its own lines of railway to a greater extent than it could do otherwise; that the probable effect of said payment was to secure to said Peavey & Co. important advantages over their competitors, and that said payment was more than sufficient to pay all the expense of operating said elevators, including taxes and insurance on and maintenance and repairs of the

buildings, but not more than a reasonable compensation for the transfer services performed.

And defendant held that the Union Pacific had a right to perform said transfer services itself by its own agencies and employees or hire a shipper to do so; that such right was not affected by the fact that a shipper so hired would thus secure important advantages over his competitors, unless the payments made were more than reasonable compensation for the service performed; and that under the circumstances disclosed by the record the payments made as aforesaid under said contract of the Union Pacific did not constitute a violation of the act to regulate commerce.

On February 19, 1906, the Supreme Court of the United States, in a decision rendered by it in the case of *New York, New Haven & Hartford Railroad Co.* v. *Interstate Commerce Commission* (200 U. S., 361), held that—

> The interstate commerce act was enacted to secure equality of rate and to destroy favoritism, and for these purposes is a remedial statute, to be interpreted so as to reasonably accomplish them; its prohibitions against directly or indirectly charging less than published rates are all-embracing and applicable to every method by which the forbidden results could be brought about. (Syllabus.)

In that case the Supreme Court declared void, because in conflict with the provisions of the act to regulate commerce, a contract entered into by and between the Chesapeake & Ohio Railway Company

and the New York, New Haven & Hartford Railroad Company, and said that such a contract, although legal when made, became void as soon as compliance with its terms involved the doing of something prohibited by said act. (Ibid., 398.)

Subsequent to said June 25, 1904, carriers other than the Union Pacific who furnished transportation facilities at points on the Missouri River and who, so far as rates of transportation were concerned, had previously placed Atchison, Kans., on a parity with Kansas City, Mo., and Kansas City, Argentine, and Leavenworth, Kans., established and put in force at the four latter points regulations whereby free elevation or an elevator allowance was accorded by them on interstate shipments of grain transferred through elevators located at said four latter points, but refused to accord a like free service or allowance at Atchison, Kans., on interstate shipments of grain transferred through elevators at that point. This discrimination was by defendant held to be a violation of the act to regulate commerce, and an order issued by defendant requiring said carriers to discontinue the discrimination was obeyed by the latter. (12 I. C. C. Rep., 111.)

For a time after said June 25, 1904, the Union Pacific confined the payment of said transfer or elevator allowance to shipments of grain transferred at Council Bluffs and Kansas City through the elevators operated as aforesaid by the Omaha Elevator Company and the Midland Elevator Company, but afterwards extended them to shipments of grain transferred through an elevator at Council Bluffs operated

by the Trans-Mississippi Grain Company, and later, and previous to April 9, 1907, extended them also to grain shipments transferred through other elevators at said points, except that it did not pay the transfer charge or elevator allowance on grain shipped over its lines of railway from points of origin in Kansas and Nebraska to points on the Missouri River, including Council Bluffs and Kansas City, in cases where the grain was put into elevators at the latter points, but on account of being ground into products or for some other reason was not reshipped over transportation lines from the river to points east thereof.

The transfer charge or elevator allowance of 1¼ cents per 100 pounds paid by the Union Pacific as aforesaid at Council Bluffs and Kansas City gave to grain dealers who purchased grain at points on lines of railway of the Union Pacific an advantage over other grain dealers who purchased their grain at points on other lines of railway in Kansas and Nebraska, and to offset this advantage carriers other than the Union Pacific established and put in force at the Missouri River regulations whereby they accorded to interstate shipments of grain originating at said other points where transferred through elevators at the river and afterwards reshipped to points east thereof a similar allowance.

But while the Union Pacific and other carriers thus established and paid elevator allowances at points on the Missouri River, such allowances were not established or paid by them or other carriers where interstate shipments of grain were transferred through elevators at other points. This caused great dissat-

isfaction, and much complaint was made by parties engaged in the purchase, shipment, and sale of grain transferred through elevators at the latter points. As a consequence and pursuant to application made by certain carriers, defendant reopened said case in July, 1906, and after due notice to interested parties made a second investigation in the premises.

Meanwhile, by a law approved on June 29, 1906, the act to regulate commerce had been amended so as to include in the term "transportation" storage, elevation, and transfer in transit, and so as to authorize defendant to determine and fix by appropriate order the reasonable maximum charge to be paid by a carrier to the owner of property transported under the act for any instrumentality furnished or any service directly or indirectly rendered in connection with the transportation of said property by such owner.

As a result of said second investigation, defendant found that the transfer or elevator allowance of 1¼ cents per 100 pounds paid by the Union Pacific on interstate shipments of grain transferred through elevators located at points on the Missouri River, as aforesaid, exceeded the cost of said transfer to the extent of ½ of a cent per 100 pounds, and to the extent of such excess operated as a rebate and gave to the owners of the grain an advantage over their competitors; held that said transfer or elevator allowance was unlawful to the extent it exceeded such cost, and by order dated April 9, 1907, a copy of which appears upon pages 18 and 19 of this answer, required the Union Pacific to cease and desist from

paying for such transfer or elevator services more than ¾ of a cent per 100 pounds of the grain transferred.

Defendant further held that if elevation were furnished by the Union Pacific for the grain of one shipper over its lines without proper arrangements being made to furnish elevation to other shippers over such lines unjust and unlawful discrimination would result, and that the aforesaid amendment to the act to regulate commerce, providing that "if the owner of property, transported under this act, directly or indirectly renders any service connected with such transportation or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable, and the Commission may, after hearing on a complaint, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the service so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order, which order shall have the same force and effect and be enforced in like manner as the orders above provided for in this section," must be read in connection with the other provisions of the law forbidding and making unlawful any arrangement or practice that results in an undue preference or an unjust discrimination in favor of one shipper as against others or that results in a rebate or other departure from the lawfully published rates. (Defendant's Exhibit 2, p. 76.)

Said order of April 9, 1907, was complied with by the Union Pacific and a corresponding change was made by other carriers in the transfer or elevator allowance paid by them at points located on the Missouri River. But thereafter the Union Pacific confined the transfer or elevator allowance paid by it to grain transferred through elevators located at the termini of the Union Pacific on the Missouri River, and said other carriers confined the transfer or elevator allowance made or paid by them almost entirely to grain transferred through elevators located at points on said river, although during all times hereinbefore mentioned and since said April 9, 1907, there have been and now are a large number of elevators located on the lines of each of said carriers at points of origin and milling points in Kansas and Nebraska west of the Missouri River, and at points in other states, and used by grain dealers in connection with the interstate transportation of grain over said lines, and during all said times there have been and now are many grain dealers engaged in the interstate transportation of grain from said points of origin over said lines who did not and do not wish to use any of said elevators in connection with such transportation.

The circumstances described in the last preceding paragraph and the discriminations which resulted therefrom so injuriously affected the parties and places discriminated against that numerous protests and complaints were forwarded to defendant subsequent to said April 9, 1907, by parties against whom

the discriminations operated, and as a consequence defendant, on April 14, 1908, reopened said case for further consideration and, giving due notice to interested parties, assigned it for further argument at Washington, D. C., on May 8, 1908, as shown by defendant's Exhibit 3, which is hereto attached and hereby made a part of this answer.

After listening to such further argument and considering same in the light of defendant's experience concerning transfer or elevator allowances paid by carriers on, and free transfer by carriers of, grain transferred through elevators at different points, and after a reexamination and careful reconsideration of the record in said case, defendant concluded that, in connection with the interstate transportation of grain, any such payment of a transfer or elevator allowance or any such free transfer made under such circumstances, that the owner of the grain, or any party interested therein, was enabled to and did, while the transfer was being made, either by himself or some one acting in his behalf, inspect, clip, clean, mix, or otherwise treat the grain, constituted an unjust discrimination, gave to such owner or interested party undue and unreasonable preference and advantage and subjected other parties who did not receive such transfer or elevator allowance or free transfer to undue and unreasonable prejudice and disadvantage, and in accordance with such conclusion, issued said order of June 29, 1908, a copy of which is defendant's Exhibit 4, which is hereto attached and hereby made a part of this answer.

Defendant further alleges that during several years next previous to June 29, 1908, there were, ever since have been, and now are at said points of origin and said milling points in Kansas and Nebraska on the lines of railway of the Union Pacific Railroad Company and other carriers having lines of railway which reach the Missouri River and penetrate the grain-producing territory west of that river and at milling points located on the river many hundred elevators through which interstate shipments of grain have been during said times and now are transferred and contemporaneously inspected, clipped, cleaned, mixed or otherwise treated by the owner thereof or some party interested there in, either by himself or some one acting in his behalf; that said grain has been during said times and now is transported over said lines of railway and that the carriers who operate said lines have during said times refused and do now refuse to pay on said grain any transfer or elevator allowance, although during all said times previous to June 29, aforesaid, they have paid and would now pay, if not restrained from doing so, a transfer or elevator allowance on other interstate shipments of grain transported over their said lines from the aforesaid points of origin in Kansas and Nebraska to said Missouri River cities and transferred at the latter points through elevators operated by members of said boards of trade and said exchange and the Omaha Elevator Company and Midland Elevator Company, and inspected, clipped, cleaned, mixed or otherwise treated by said members and the Omaha and Midland com-

panies, the owners and shippers thereof, at said Missouri River cities, while being so transferred.

That while carriers were paying transfer or elevator allowances on interstate shipments of grain as alleged in the last preceding paragraph many other interstate shipments of grain owned by other parties were transported by said carriers over their lines of railway from said points of origin to said Missouri River cities, but were not transferred through any elevator at said cities, and that upon such shipments said carriers refused to pay any transfer or elevator allowance.

That as a practical matter the owners of grain transported from points in states where the grain is produced to points of destination in other states must and always do cause the grain to be transferred through an elevator at some point and inspected, clipped, cleaned, mixed, or otherwise treated while being so transferred. That the value to such owners of having their grain so handled is on an average as great as the cost of such handling, and ranges from ½ of a cent per 100 pounds to 4 or 5 cents per 100 pounds, but that the cost of so handling grain is more at one point than at another point and more at one time than at another time at the same point. That the charge exacted in each instance by the Union Pacific Railroad Company and said other carriers whose lines of railway reach said Missouri River cities and penetrate the grain-producing territory in Kansas and Nebraska and other states for transporting said interstate shipments of grain from said

points of origin over their lines of railway to said Missouri River cities was during all said times previous to June 29, 1908, their full published rate applicable to such transportation, and that where as aforesaid they paid transfer or elevator allowances to members of said boards of trade and said exchange and to the Omaha and Midland companies such payments operated as a departure by said carriers from their published rates and constituted a violation of section 2 of the act to regulate commerce in that said carriers by reason of the premises charged, demanded, collected, and received in each instance of such departure from one person or party for a service rendered in the transportation of grain a greater compensation than they contemporaneously exacted from another person or party for the transportation of a like kind of traffic under substantially similar circumstances and conditions, and also constituted a violation of section 3 of said act in that by reason of the premises said carriers in each instance of such departure gave to certain parties and localities undue and unreasonable preference and advantage and subjected other parties and other localities to undue and unreasonable prejudice and disadvantage.

Defendant further alleges that while the payments made at the Missouri River cities by said carriers as aforesaid are termed upon the tariffs of the carriers "transfer allowances," they are in point of fact elevation allowances, and that if such pay ments were not made the parties who receive the payments would have to perform in precisely the same way and to the

same extent the services for which such payments are made.

Defendant further alleges that 1¼ cents per 100 pounds is a large profit for handling grain, and is so regarded by grain dealers, and that oftentimes the profit derived from such handling does not exceed ⅛ of a cent per bushel; that therefore if said carriers can, under the pretense of paying for transfer services, refund to members of said boards of trade and said exchange and to the Omaha and Midland companies ¾ of a cent per 100 pounds of the grain transferred at Missouri River cities while the competitors of said members and of said Omaha and Midland companies receive no such allowance, there arises in favor of said members and said Omaha and Midland companies an unjust discrimination which, if such payments could be confined to them, would give them a monopoly of the grain business, and that the unlawful discrimination arises out of the fact that the services rendered by said members and said Omaha and Midland companies is not an incident to the transportation of their grain, although it may result in a physical transfer from car to car, but is elevation which must be performed by such grain dealers in the prosecution of their business.

Defendant further alleges that when interstate shipments of grain are hauled by carriers as aforesaid over their lines of railway to said Missouri River cities from points of origin in Kansas and Nebraska the rate for such transportation published, filed, exacted, and received by the carriers is the same where

the final destination of the grain is one of said Missouri River cities as where such final destination is some point east of the Missouri River.

Defendant further alleges that where grain is transported to and from said Missouri River cities and transferred through elevators at the latter points as aforesaid, the transportation of the grain to said Missouri River cities from points of origin is entirely separate and distinct from and in no way connected with the transportation of the grain from said Missouri River cities to destinations east of the Missouri River, and that the latter transportation is upon a contract of transportation and bill of lading independent of and different from the contract of transportation and bill of lading pertaining to the former transportation.

All of which matters and things the said defendant is ready to aver, maintain, and prove as this honorable court shall direct; and thereby prays to be hence dismissed, with its reasonable costs and charges in that behalf sustained.

THE INTERSTATE COMMERCE COMMISSION,

By ---------- ----------,
Secretary thereof, thereunto duly authorized.

ARBA S. VAN VALKENBURGH,
United States Attorney,
Kansas City, Mo.

P. J. FARRELL,
Special Assistant United States Attorney,
Washington, D. C.

Solicitors for Interstate Commerce Commission.

WASHINGTON, *District of Columbia, ss:*

I, Edward A. Moseley, Secretary of the Interstate Commerce Commission, having read the foregoing answer and knowing the contents thereof, hereby make oath that the matters of fact therein stated are true to the best of my knowledge, information, and belief.

---------- ----------,

Secretary of the Interstate Commerce Commission.

Subscribed and sworn to before me, H. S. Milstead, a notary public in and for said District of Columbia, this the day of January, 1909.

[L. S.] ---------- ----------,

Notary Public.

69312—09——7

EXHIBITS NOS. 1 TO 9, INCLUSIVE.

EXHIBIT No. 1.

No. 687.

IN THE MATTER OF ALLOWANCES TO ELEVATORS BY THE UNION PACIFIC RAILROAD COMPANY.

Decided June 25, 1904.

The U. P. R. Co. entered into contracts with P. & Co. under which the latter erected grain elevators at Council Bluffs and Kansas City for the transfer of grain at those terminals of the U. P. System, and for the service of transferring grain by elevator at said points the U. P. agreed to pay P. & Co. 1¼ cents per 100 lbs. Corporations controlled by P. & Co. were formed to conduct the elevators at each point. P. & Co. are large buyers and shippers of grain in the northern and western grain producing states and control a large number of country elevators. In making this arrangement the U. P. acted in good faith, and the facts indicate that 1¼ cents per 100 lbs. is not an excessive charge for the service as conducted by the elevator companies. The real complainants in the proceeding are carriers competing with the U. P. who claim that if this arrangement is not declared illegal they will be compelled to make similar allowances at transfer points on their lines, and no shipper nor any dealer in competition with P. & Co. has appeared to complain or protest in any manner against this arrangement. *Held*:—

1. That the compensation paid for the elevator or transfer service is not unreasonable.

2. That the U. P. is entitled to perform the work itself or hire it done by others and is not legally at fault or guilty of wrong doing because incidentally those employed by the carrier to transfer the grain are aided more or less in another line of business in which they are engaged.

3. That any injury or detriment resulting to rival carriers under the arrangement is something which the law does not seek to prevent.

J. N. Baldwin and *J. C. Stubbs* for Union Pacific R. R. Co.

M. B. Koon and *Frank Hagerman* for Omaha Elevator Company and Midland Elevator Company.

Gardiner Lathrop for Atchison, Topeka & Santa Fe Ry. Co.

KNAPP, *Chairman*:

Acting upon information in the nature of informal complaint, the Commission instituted this inquiry on its own motion to ascertain the facts respecting allowances by the defendant company to the owners of certain elevators and to determine whether, as is claimed, those allowances are in violation of law.

The Union Pacific Railroad Company operates an extensive system of railways in the states of Nebraska, Kansas, Colorado, Wyoming, and Utah. The principal line of this system extends from Council Bluffs, Iowa, to Ogden, Utah, and there is another main line from Kansas City, Missouri, to Denver, Colorado. These two lines are connected by a line from Denver to Cheyenne, Wyoming, and from a point on the latter there is a connecting line to Julesburg on the line first described. There are also various auxiliary and branch lines in the states above mentioned, the total mileage operated being nearly three thousand miles. The eastern termini of the system are at Council Bluffs and Kansas City, both located on the Missouri River. No line leading easterly or southerly from those points is owned or controlled by the Union Pacific company.

The lines competing with the Union Pacific in Nebraska are the Burlington, the Rock Island, and the Nebraska Division of the Chicago & Northwestern, formerly the Fremont, Elkhorn & Missouri Valley. There is limited competition in that state with the Omaha road, a part of the Northwestern system, and with the St. Joseph & Grand Island. In Kansas the principal competitors of the Union Pacific are the Atchison, the Missouri Pacific, and the Rock Island. To some extent the Burlington and the Missouri, Kansas & Texas are competitors in the last-named state.

Of the carriers above named, the Burlington, the Rock Island, and the Northwestern have lines extending easterly from Council Bluffs and Omaha to Chicago. The Burlington and the Northwestern also have lines connecting Nebraska points with Chicago which do not pass through Omaha and Council Bluffs. The Burlington, the Rock Island, and the Atchison have lines extending easterly from Kansas City to

Chicago. The Missouri Pacific has its northern terminus at Omaha, and all its lines are west of the Missouri River. The Missouri, Kansas & Texas system is mainly south and west of Kansas City and St. Louis, though it has a line to Hannibal on the Missouri River. The St. Joseph & Grand Island is wholly in Kansas and Nebraska.

There are several important roads which extend easterly from various points on the Missouri River, but have no lines west of that river. Among these are the Chicago, Milwaukee & St. Paul and the Wabash, reaching both Omaha and Kansas City; the Chicago Great Western, reaching Omaha, St. Joseph, and Kansas City; the Illinois Central, reaching Omaha; the Chicago & Alton, reaching Kansas City and St. Louis; and the Toledo, St. Louis & Western, reaching St. Louis. So far as concerns the questions in this case the Union Pacific is the only extensive system operating wholly in the territory west of the Missouri River.

In the states of Nebraska and Kansas there is a large production of grain which moves over the lines of the Union Pacific to the Missouri River on its way to eastern and foreign markets. If this grain is carried to destination in the Union Pacific cars in which it is originally loaded, the transportation must be completed by connecting lines over which the Union Pacific has no control. As the principal markets of consumption are in the eastern states and foreign countries, the grain must be carried long distances to reach domestic destinations or the ports of transshipment abroad. In such case the cars are absent from the originating road for considerable periods of time and the interval before their return is a matter of uncertainty. When this method of transporting the grain is employed the Union Pacific must relinquish possession of its cars at the Missouri River and can get them back again only after prolonged and indefinite absence. In the meantime the company is deprived of the use of such cars and can not know when they will again be available for its own shippers.

For the most part grain is transported in bulk in ordinary box cars, the same as those used for miscellaneous freight. The movement is not constant and regular throughout the year, but is largely confined to comparatively short seasons, depending more or less on the size of the crop and

the range of obtainable prices. During the grain-shipping seasons there is a pressing demand for cars, particularly when market conditions tend to stimulate sales. It is a matter of common knowledge that the last few years have been exceptionally prosperous in all branches of business. Not only has the grain production in the states named been greatly increased, but traffic of all kinds has been offered for carriage in unprecedented volume. Although the Union Pacific—in common with other roads—has made large additions to its car and locomotive equipment, it has frequently been unable to meet the requirements of shippers. The growth of its traffic has exceeded the increase of its transportation facilities. Under these circumstances it could ill afford, in justice to its own patrons, to allow its cars to pass from its control and to be absent for varying and uncertain periods, in order to carry to destination the grain originating on its lines.

Moreover, the loading of cars at the country stations, either because the older cars of the Union Pacific are of low capacity or because of conditions at the points of origin, is in most cases comparatively light. The economical movement of this grain for the long distances it is carried east of the Missouri River requires a heavier loading of cars than can ordinarily be secured at the local stations of the initial road. It seems reasonable to believe that in actual practice the original loading of grain cars on the lines of the Union Pacific would generally fall below the loading needful to the cheapest hauling of the grain to remote destinations.

For these and perhaps other reasons it became highly important, if not absolutely essential, for the Union Pacific to provide for the transfer of this grain to other cars than its own at its termini on the Missouri River. Such a transfer was practically necessary to secure the prompt release of its equipment, to enable it to retain the control and use of its cars, and thereby to better satisfy the demands of shippers upon its lines. This requirement of the situation could be met by the Union Pacific either by arranging for the transfer by its own appliances and employees or by contracting with others to perform the required service. The latter course was adopted, and thereupon an agreement was entered into which will now be described.

This agreement was executed under date of February 7, 1899, and the contracting parties are the Union Pacific Railroad Company and Frank H. Peavey, of Minneapolis. The provisions of the contract are somewhat elaborate, but those material to the present controversy can be briefly stated. The railroad company agreed to convey to Peavey a certain tract of land in Council Bluffs, containing about 90,000 square feet, and any additional land adjoining the same that might be required to enlarge the elevator building which Peavey was to construct; to provide yard room and maintain a system of side tracks and switches in connection with such elevator, according to plans shown on a map attached to and made a part of the contract; to deliver to said elevator all grain originating on its lines and transported thereover which might be consigned to or in cars of said elevator, and to pay Peavey on all such grain transferred through said elevator a transfer charge not exceeding one and one-quarter cents per hundred pounds during the first ten years of the contract, and not exceeding one cent per hundred pounds thereafter, but at no time more than the transfer charge customarily made on similar business at similar points; to provide for said elevator equal privileges and advantages to those granted any other elevator then or thereafter served by it at Omaha or Council Bluffs, and to switch free of charge all cars, loaded or empty, to and from said elevator, between points on its road within ten miles of Omaha; to receive from and deliver to connecting roads at Council Bluffs cars for loading, unloading, or transfer of grain at said elevator as cheaply as it handles cars for loading, unloading, or transfer to any other elevator at Omaha or Council Bluffs, and not exceeding such aggregate sum in any one year as will equal five per cent on its investment, as described in the contract, the total cost to be apportioned between the several lines on a wheelage basis; and to permit other connecting roads at Council Bluffs to use said side tracks and switches for access to said elevator upon terms stated at length in the contract, which are not claimed in this proceeding to be unfair or unreasonable.

Peavey on his part agreed to erect on said premises and have ready for operation by June 1, 1899, a first-class elevator, equipped with modern appliances, of the capacity of about 1,500,000 bushels, and thereafter to maintain the

same in like condition; to receive from the railroad company any grain originating on its lines consigned to or in care of said elevator to the capacity thereof, and to promptly transfer such grain from the company's cars through said elevator, the grain tendered by the company to be first transferred and its cars promptly released; and to receive and safely store in said elevator for forty-eight hours free of charge any grain originating on the company's lines and delivered from its tracks at said elevator for storage or transfer.

In pursuance of this contract the elevator was built at a cost of about $200,000. It was completed in the summer of 1899 and has been in operation since that time. While the elevator was in process of construction or soon afterwards, as we infer, Peavey assigned his interest in the contract, with the consent of the Union Pacific, to the Omaha Elevator Company, a corporation which appears to have been organized for the purpose of acquiring the elevator plant and business, and which has since owned and conducted the same. This involved no substantial change of proprietorship, as a controlling interest in the stock of the corporation has always been owned by members of the firm of F. H. Peavey and Co., of which Frank H. Peavey was the senior partner. He died in December, 1901, but the business has been continued by the surviving partners, and those interested in his estate, as we understand, under the same firm name. In other words, this firm is the virtual owner of the elevator in question and the beneficiary of the contract with the Union Pacific.

A similar situation exists at Kansas City and a similar arrangement was made by the Union Pacific for the transfer of grain at that point. The elevator there is located in Kansas City, Kansas, which is commercially the same as Kansas City, Missouri. This elevator, which has a capacity of about 1,000,000 bushels, is operated by the Midland Elevator Company, a corporation whose capital stock is substantially all owned by the individual members of the firm of F. H. Peavey & Co. There appears to be no written agreement between the Union Pacific and the Midland Elevator Company, but the terms upon which grain is transferred and stored by the latter company, and the other incidents of its relations with the Union Pacific, are practically if not

identically the same as those provided in the contract with the Omaha Elevator Company above described. For this reason it seems unnecessary to make more specific findings in regard to the Midland Elevator Company or to separately discuss the questions presented by the contract with that company.

These agreements appear to have been carried out in conformity with their terms and to the mutual satisfaction of the parties thereto. It is not claimed that any greater allowances are made to the elevator companies, or that any other benefits are derived by the owners thereof, than those accorded by the contracts in question; the contention is that the observance and execution of these contracts, by reason of facts about to be stated, secure to Peavey & Co. undue preference and advantage and subject other shippers to undue prejudice and disadvantage.

F. H. Peavey & Co., according to the testimony of a member of that firm, are grain merchants and owners of elevator properties. They appear to have some 450 country elevators, as they are called, in the States of North Dakota, South Dakota, Minnesota, Iowa, Nebraska, and Kansas, besides larger elevators at Council Bluffs, Kansas City, Duluth, Minneapolis, and Chicago, and their business is extensive in the States named and elsewhere. As above found, they control and virtually own the two elevators at Council Bluffs and Kansas City. They are also large buyers of grain upon the Union Pacific system. So much of the grain thus bought as is consigned to Omaha or Council Bluffs, that is to the Omaha Elevator Company, is purchased in the name of that company; that which is consigned to Kansas City appears to be bought in the name of the Midland Elevator Company; but this does not matter in one case or the other. The practical identity of the three concerns renders the form of the transactions quite unimportant. It is sufficiently accurate, therefore, and serves the purpose of convenience, to speak of Peavey & Co. as grain buyers and shippers on the lines of the Union Pacific.

While no definite figures were given, it is fairly inferable from the testimony, and was understood to be admitted in a general way, that Peavey & Co. handle some sixty per cent, perhaps more, of the grain shipped from Union Pacific sta-

tions. Substantially all the grain so shipped by them is transferred through these Peavey elevators, and on all that grain they are paid the 1¼ cents per hundred pounds for making the transfer. At Kansas City, however, a small amount of this grain is consumed locally, and any transfer charge collected on such grain is refunded. It also appears that little or no grain is transferred through these elevators for other parties, although the Union Pacific has the right to require such transfer under the terms of its contract. The reason assigned for not exercising this right is that the Union Pacific can and does, as a practical matter, provide for the through transportation of grain shipped by other dealers without transfer at its terminals. In the interchange of carload traffic the Union Pacific takes to points on its lines a large number of cars belonging to its connections, and many of these cars are available for return loads of grain. In some cases also, as it seems, Union Pacific cars loaded at interior stations with grain of such dealers are allowed to go to destination, or at least to points east of the Unoin Pacific lines. To some extent there appears to be shovel transfer for shippers other than Peavey & Co. In these ways, it is said, the grain shipments not controlled by that firm are fully accommodated without the necessity of a transfer through the elevators in question.

Some indication of the amount of grain transferred by the Peavey elevators appears from a statement produced at the hearing. This statement shows that 12,329,381 bushels were transferred at Kansas City between July, 1898, and May, 1903; and that 23,839,533 bushels were transferred at Council Bluffs between July, 1899, and May, 1903. The amount varies greatly in different years. For example, the lowest year at Council Bluffs was 2,953,776 bushels, the highest, 8,695,594; at Kansas City the lowest was 1,120,441 bushels, the highest, 4,673,850.

Now, in view of these and other related facts, it is charged that the Union Pacific arrangement with these elevator companies owned by Peavey & Co. is preferential and unlawful. This charge is based at last upon the claim that the contract price for transferring grain is exorbitant and unreasonable, that it is much greater than the necessary cost of performing the service, and that, therefore, it has the indirect but actual effect of a prohibited concession or rebate to Peavey & Co.,

because they are the shippers of the grain thus transferred at a profit through their own elevators. In the language of one of the briefs: "*The contention is that the payment of a cent and a quarter per hundred pounds is excessive, and the resultant effect of operations under said contract, and upon the basis therein provided, is that the Union Pacific Railroad Company discriminates in favor of the two elevator companies as grain shippers; that the allowance of a cent and a quarter per hundred pounds, paid to the said elevator companies for transferring their own grain, amounts in its ultimate result to a rebate, because it so much reduces the through published rate, in favor of said elevator companies, but not in favor of other shippers.*"

This is the controverted question of fact which will now be considered. To this question much of the testimony was directed, and widely divulgent claims are made by different parties. Among the proofs submitted is a statement from the books of Peavey & Co., produced by a member of that firm, showing the receipts and expenses of the two elevators for a period of years. From this statement, the accuracy of which was not seriously questioned, it appears that the total earnings of the Council Bluffs elevator for the transfer of grain from July, 1899, to June, 1903, were $157,639.96; the expenses of operation, including taxes, insurance on building, maintenance and repairs, $110,468.30; and the aggregate profit, $47,171.66, or an average annual profit of $11,792.91. At Kansas City the earnings for transferring grain from July, 1898, to May, 1903, were $92,069.63; the operating expenses, including the same items, $77,500.00; the aggregate profit, $14,569.63; the average annual profit, $2,913.92. This allows nothing in either case for interest on investment, depreciation of plant, insurance on grain in storage, or expenses of general management. The elevator at Council Bluffs cost $200,000; the one at Kansas City, $150,000. If these figures are substantially correct, as we assume they are, it is evident that the transfer business, considered by itself, was unprofitable and that Peavey & Co. could not afford to construct and operate these elevators for the sole purpose of transferring grain at 1¼ cents per hundred pounds.

The chief traffic officer of the Chicago Great Western testified that elevators were operated by that road at Kansas City and St. Joseph through which a large amount of grain

is transferred at a cost, not including taxes or expenses of general management, of 1⅛ cents per hundred pounds, and that he would be very willing, for reasons stated by him, to pay an independent company 1¼ cents for performing the service. It also appears that another carrier pays one cent per hundred pounds for transferring grain at Burlington, Iowa, and has done so for a number of years. This payment is made to a firm which buys extensively on the lines of that carrier and whose business is similar to that conducted by Peavey & Co. It should be stated, however, that the allowance to this concern is claimed to be made, partly at least, because of the transfer charges paid to their competitors, Peavey & Co., at Council Bluffs and Kansas City.

Other facts disclosed tend more or less to show that the allowance to Peavey & Co. is not unreasonable. For instance, at Council Bluffs there is another elevator, with a capacity of 750,000 bushels, belonging to the Union Elevator Company. The stockholders of that company are six railroads, viz: The Union Pacific, the Northwestern, the Burlington, the Rock Island, the Milwaukee, and the Wabash, each owning a one-sixth interest. This elevator is leased to and operated by the Trans-Mississippi Grain Company, and that company transfers grain through its elevator on the same terms and conditions that grain is transferred through the Peavey elevators. The Trans-Mississippi Grain Company is also, as we understand, a large buyer and shipper of grain. To the extent of its business, therefore, it seems to be in much the same situation as Peavey & Co. and in like relation to other buyers on lines where its purchases are made. The fact that a rival concern, operating over various roads in that section of country, receives the same compensation for transferring grain as Peavey & Co. is some indication that the amount paid is not excessive.

A like inference apparently follows from comparison with elevator charges fixed by state regulation or customarily paid at other points where large quantities of grain are handled. Without detailing the figures it is sufficient to say that the prices elsewhere applied, taking into account differences of conditions, do not establish the claim that Peavey & Co. are unduly remunerated.

Moreover, it was not seriously contended that Peavey & Co. in fact pay any more for grain than other buyers. One witness, it is true, expressed a rather vague opinion to the contrary, but aside from his statement the testimony was unqualified that the arrangement in question had not affected the prices paid to the producer. In other words, using the phrase frequently heard, the transfer charge was not "reflected into the interior." This was affirmed or admitted by all the traffic officials of other roads who were called to testify, with the single exception mentioned.

In this connection we are asked to consider the apparent absence of complaint by rival dealers respecting the arrangement in question. The shippers of grain from Union Pacific stations, other than Peavey & Co., are quite numerous, and the business of some of them must be of considerable extent. In the aggregate they handle nearly forty per cent of the grain originating on that system. Of the 202 country elevators on the Union Pacific in Nebraska, only 71 appear to be operated by Peavey & Co.; and of the 182 in Kansas, only 40 are owned by that concern. This shows a competitive interest of substantial proportions. The failure of competing shippers to make known their grievances, if they have any, or to so much as send a letter of remonstrance to the commission, is some indication that they have not regarded the payment of these transfer charges as an undue preference to Peavey & Co. The freight traffic manager of the Union Pacific positively asserts that no shipper has complained to his company, and nothing has occurred in the course of the inquiry to suggest that he is misinformed or mistaken in that regard. But this elevator arrangement must have been known for a considerable time to other grain buyers upon the Union Pacific system and elsewhere. It was publicly disclosed before the Commission at Kansas City in 1902 and appears then to have been generally understood. The first hearing in this case, at Chicago in June, 1903, when the written contract was produced, was the subject of newspaper report which gave extended publicity to these transfer charges and to the fact that they were under investigation. There is little doubt that the main features of these contracts, or at least the amounts paid thereunder for the transfer of grain, were long ago brought to the

knowledge of competing shippers on the lines of the Union Pacific and to other buyers of grain in that part of the country. Yet no shipper has volunteered to come forward or been produced as a witness to sustain the accusation of unlawful conduct. The Commission is aware that wrongdoing has often been suspected in connection with elevator allowances at various points, and is likewise aware that those who obtain such allowances appear to control the greater part of the grain business. For this reason it is somewhat surprising that the competitors of Peavey & Co. have failed in this proceeding to offer any objection to the transfer charges received by that firm, if those charges are believed by them to operate to their disadvantage. So far as their silence has any significance it would seem to discredit the claim that Peavey & Co. are excessively paid.

Against evidence of this character is proof of the amounts said to be paid for transfer at various points and under conditions of alleged similarity. There is more or less shovel transfer at one place and another at a cost stated to range from $1.25 to $1.75 per car. The Rock Island pays at Kansas City $2.00 per car for cars under 50,000 pounds, $2.25 for cars over 50,000 pounds and under 60,000 and $2.50 for cars over 60,000 pounds. The Atchison pays $2.00 per car to a small elevator at Argentine near Kansas City. The Burlington produced a contract for the construction of a large elevator at Harlem, across the river from Kansas City, and the transfer of grain by the parties agreeing to erect the same for $1.75 per car, but it appears that nothing has been done to carry out this contract. Moreover, it contains a provision, as we understand it, that if transfer charges at Kansas City are made greater "*by custom or otherwise*" the owners of the elevator "shall have the right to withdraw from this arrangement for transfer." The vice-president of the Burlington also stated that his company owned an elevator at East St. Louis, where grain was transferred *at a profit* for one-quarter of a cent per bushel. There is no question that in so testifying he expressed his honest belief at the time, but it is fairly certain that he was mistaken. A statement subsequently filed by him, purporting to show the actual performance of that elevator for the year ending June 30, 1903, shows a total of 4,057,224 bushels of grain

transferred during that period. At ¼ cent per bushel this would give gross receipts for *transferring* of only $10,143.06. As the elevator is stated to represent an investment of over $250,000, it is evident that it did not and could not make money in transferring grain at ¼ cent per bushel, however profitable its *entire business* may have been during that year.

Taking into account the whole evidence bearing upon the question and giving due consideration to all the facts disclosed, we are unable to find that the amount paid Peavey & Co. for transferring grain is unreasonable under the circumstances surrounding the Union Pacific. No reason is suggested why the arrangement should not be presumed to be just and fair, and nothing has been shown, in our judgment, to overcome that presumption. It may be that the needs of the Union Pacific do not require such large and expensive elevators, and that the necessary transfer could be effected by other means and with a smaller expenditure. Even if that be so, and at most it is quite uncertain, we would not be warranted in finding the carrier guilty of wrong-doing unless something substantial appeared, which we do not perceive, to impeach the honesty of the transaction. So far as we can see, these transfer contracts were made in good faith, for the legitimate protection of the Union Pacific, and there is failure of proof of any unlawful purpose connected with the arrangement. True, the Burlington says it would be willing to make the transfer without charge, but that of course would be upon condition that it secured the carriage of the transferred grain. To obtain the traffic and consequent earnings it might very likely afford to stand by its offer but that is far from proving that the price paid to Peavey & Co. exceeds the actual or reasonable cost of performing the service.

Some testimony was given as to the feasibility and expense of what is called shovel transfer. This method may be cheaper under favorable conditions and for a limited volume of business, but for the extensive grain traffic of the Union Pacific it is of doubtful economy and otherwise unsatisfactory. The only efficient and adequate mode of transfer is through elevators of large capacity located at the terminals where the transfer is to be made. This being so, it was proper and legitimate for the Union Pacific to enter into the arrange-

ment in question, and that arrangement, from the standpoint of the carrier's interest, was expedient and desirable.

Undoubtedly the general business of Peavey & Co. is greatly benefited by the ownership of these elevators, and this they freely admitted. As a practical matter, they need at some point a large amount of storage room, where grain can be graded and "blended," or held to await favorable market conditions at points of destination. These and other like advantages are secured to them by operating the two elevators at Council Bluffs and Kansas City, and for this reason they can well afford to transfer grain for the Union Pacific at a price which otherwise they would not be willing to accept. As a transfer proposition pure and simple, taking into account the cost of these elevators and the expense of their operation, it would not seem to be attractive; by reason of its incidental aid to the extensive business of these grain merchants it is undoubtedly a very profitable arrangement.

It should perhaps be added that no allowance is made by the Union Pacific to any country elevator, whether owned by Peavey & Co. or by other parties. As we understand the matter, the only elevators to which allowances are made are the terminal elevators described in this report. It is also the fact that no charge is made by Peavey & Co. in any case to roads taking the transferred grain from these elevators for carriage to destination.

This brings us to the statement that the real complainants in this case are carriers directly competing with the Union Pacific or operating in the same general territory. These carriers allege, as above stated, that the transfer charges paid to Peavey & Co. are excessive and unreasonable, and that they have the effect of an illegal discrimination in favor of that firm and against other shippers of grain. They also say, and this is perhaps the main ground of their objection, that if these charges are not unlawful, and the Union Pacific continues the arrangement indefinitely, they will be obliged to make similar allowances for a like service at points where the transfer of grain may by them be deemed necessary. We quote again from the brief already referred to as follows: "*If the allowance be permitted to stand, the other railroads in the competitive territory must necessarily meet it in dealing*

with their patrons, or suffer their patrons and themselves to be placed at a constant disadvantage, with the tendency of creating in that territory a grain buying monopoly in favor of the Peavey elevators and a grain haul monopoly in favor of the Union Pacific Railroad Company."

With reference to this aspect of the matter it may be mentioned that in one important respect the conditions at Kansas City are unlike those at Council Bluffs. Kansas City is a grain market. A large portion of the grain carried to that point is sold there; actually changes ownership there, after the manner of a grain market, although most of it is then taken on to other destinations. For this reason, grain at Kansas City becomes subject to competition between all the lines leading easterly and southerly therefrom, some of which do not extend west of the Missouri River. On this account, it is said, the roads bringing grain to Kansas City lose control of it, so to speak, at that point and the transportation is continued by connecting lines. In other words, the originating roads which extend through to Chicago, for example, like the Atchison and the Burlington, have no advantage in this respect over originating roads which terminate at Kansas City, because of the general buying and selling which there takes place, and because through rates to the East are the same as the combined rates in and out of Kansas City. It was testified by officials of the Atchison, the Burlington, and the Missouri Pacific that the amount of grain taken out of Kansas City by their respective lines is small in comparison with the amount which they severally carry to Kansas City in the first instance. Consequently, they say that they are under as much compulsion to transfer grain at Kansas City, for the release of their equipment and other purposes, as is the Union Pacific at either of its eastern terminals. Therefore they must provide the same facilities or make the same allowances for grain transfer at Kansas City, and perhaps other places, as may escape disapproval in this proceeding in the case of the Union Pacific. Whether this be true to the extent claimed is not altogether certain, but it may be assumed to be so without affecting the legal question involved because, in our view of the law, the materiality of the fact is not apparent.

CONCLUSIONS.

However objectionable the arrangement in question may appear from any point of view, we are convinced, rather against our original impressions, that it can not be adjudged unlawful. This conclusion follows from our determination of the controlling facts, and there is no occasion for extended comment. We have found that these contracts for transferring grain were made in good faith and for a legitimate purpose, and that the compensation paid is not unreasonable for the service performed. The parties were competent to contract, the thing done is proper and necessary to protect the interests of the carrier, the consideration is not excessive, and the honesty of the transaction is unimpeached.

Assuming the correctness of these findings, which seem to us to be required by the evidence, we are constrained to hold that no violation of law has been established. It may be that Peavey & Co. as grain shippers secure important advantages over their competitors by reason of these elevator allowances, and this we think is at least the probable effect of the arrangement, but it does not follow that the Union Pacific is chargeable with disregard of its legal obligations. If this carrier had the right to contract for the transfer of grain at its eastern terminals, which appears to be undisputed, and if the contracts were made in good faith and the amount paid fair and reasonable, all things considered, so that the required service is obtained at no greater cost than would otherwise have been incurred, as we have substantially found, how is the transaction rendered unlawful by the circumstance that the parties contracted with are grain shippers who *as such* may be greatly benefited by the arrangement? The Union Pacific was not debarred from dealing with Peavey & Co. because they happen to be grain merchants as well as elevator proprietors. It was open to the carrier to do this work itself, by its own agencies and employees, or to hire it done by others if deemed more expedient; and there was nothing to prevent an honest bargain with whomsoever would undertake to furnish the desired facilities, not excluding those who were also important shippers. This being so, the Union Pacific is not legally at fault or guilty of wrongdoing because

it turns out, as an incidental result, that the persons employed to transfer grain are thereby aided more or less in another line of business in which they are engaged. This in effect, as we think, decides the question presented.

It is urged, however, by other carriers, claiming to be in the same situation as the Union Pacific, that refusal to condemn the transfer charges paid by that company will oblige them to make similar allowances for like service at Kansas City and elsewhere. This apprehension on their part may be well founded, but how does that alter or affect the legal rights of the respondent? The law imposes no duty upon the Union Pacific to safeguard the business of its competitors or the shippers they serve. Granted that the allowance to Peavey & Co. places these other carriers and grain dealers on their lines at some commercial disadvantage, that it introduces an element of competition which they will be forced to equalize—and that would seem to be its character so far as rival roads are concerned—on what theory can the Commission interfere so long as the obligations of the Union Pacific to its own shippers are not disregarded? Plainly, as it seems to us, the indirect effect of the arrangement upon other lines or those who patronize them, whatever that effect may be, is no more a violation of the Act than would be a reduction of the *rate* by the Union Pacific which a competing road, in justice to its shippers or in its own interest, might feel compelled to meet. Any resulting injury or detriment to rival carriers is something which the law does not and perhaps should not seek to prevent.

It is scarcely needful to add that arrangements of the kind investigated in this proceeding are not favorably regarded. When anything directly connected with the public service which a carrier is bound or undertakes to perform is farmed out, so to speak, to one of its own shippers, the relation thereby brought about is likely to excite distrust and to be looked upon with suspicion. The provisions of the regulating statute may not be violated, because any resulting discrimination may not be undue, but the situation created can not be wholly satisfactory. Under existing conditions the transfer of grain through elevators at various points seems to be a virtual necessity both to the grain carrier and the grain

dealer; but we are not unmindful of the fact that the persons to whom these elevator allowances are made appear to control a very large share of the grain business. As a practical matter this may be unavoidable, nor is it necessarily unlawful, but the methods adopted and now in vogue in this regard are liable to abuse and therefore not to be encouraged. In this case, however, we are persuaded, upon the facts disclosed and our view of the law, that no requirement of the act has been disregarded and that the respondent carrier is entitled to a dismissal of the complaint.

EXHIBIT No. 2.

No. 687.

IN THE MATTER OF ALLOWANCES TO ELEVATORS BY THE UNION PACIFIC RAILROAD COMPANY.

Decided April 9, 1907.

Rehearing on the petition of the Chicago Great Western Railway Company, the Chicago, Burlington & Quincy Railway Company, and the Atchison, Topeka & Santa Fe Railway Company.

1. Elevation is defined as unloading grain from cars or grain-carrying vessels into a grain elevator and loading it out again after a period of not to exceed ten days; it does not include "treatment" or grading, cleaning, and clipping of grain; and retention in an elevator beyond ten days becomes storage and is not a part of the service of elevation as that word is used in the statute.
2. The law clearly recognizes elevation as a facility which the carrier may provide, and this authorizes the carrier to grant grain elevation at destination or while the traffic is in transit, subject only to the restriction imposed by the act that elevation, like any other service offered by the carrier to shippers, must be open to all on equal and reasonable terms.
3. Since a carrier subject to the act to regulate commerce is entitled to provide elevation for grain shipments, such carrier may either construct and operate the elevator itself or furnish elevation by arrangement with the owner of an elevator; and the amount of compensation paid by the carrier to the owner of an elevator rendering the service is of no concern to shippers or to other carriers, unless it operates to affect the rates charged by the carrier upon the grain traffic or by some device a portion of the allowance is returned to shippers and thus becomes a rebate.
4. An allowance made to a shipper of grain, who furnishes elevation service under an arrangement with a carrier, is a rebate and an unlawful discrimination when it involves a profit over and above the actual cost to such shipper of the service rendered. It is not a rebate when the allow-

ance does not so exceed the actual cost. The arrangement between the Union Pacific Railroad Company and the Peavey elevators at Council Bluffs and Kansas City is not in itself unlawful. But the allowance of 1¼ cents per 100 pounds paid by the railroad company to these elevators, controlled by the Peavey interests, who are large shippers of grain and own practically all the grain going into the elevators, is in excess of the actual cost of the service, and is a rebate and therefore unlawful. *Ordered*, That such allowance be reduced and shall not exceed three-fourths of a cent per 100 pounds.

Davis, Kellogg & Severance for Chicago Great Western Railway Company.

Gardiner Lathrop for Atchison, Topeka & Santa Fe Railway Company.

J. W. Blythe, C. J. Green, and *J. E. Kelby* for Chicago, Burlington & Quincy Railway Company.

J. N. Baldwin for Union Pacific Railroad Company.

Hagerman & Koon for Peavey & Co

John H. Marble for the Commission.

REPORT AND ORDER OF THE COMMISSION.

HARLAN, *Commissioner:*

The allowances on grain received over its lines that have been made for some years by the Union Pacific Railroad Company to the Omaha Elevator Company and the Midland Elevator Company, proprietors of certain elevators at Council Bluffs and Kansas City, commonly known as the Peavey Elevators, were the subject of an investigation undertaken by the Commission on its own motion prior to June 25, 1904, on which date the report and opinion of the Commission was announced. Subsequently, in July, 1906, the proceeding was reopened upon the petition of certain railroad companies interested in the grain traffic of the territory tributary to those points, and much additional testimony was taken, upon which, as well as upon the original record, the whole matter has now been fully reheard, the oral arguments of counsel having been supplemented by printed briefs.

The pertinent facts developed upon the original inquiry are set forth in detail in the report and opinion then announced. (*Vide* 10 I. C. C. Rep., 309.) It will not be necessary, therefore, now to restate them. Since that time Omaha has become a grain market of sufficient importance to support fifteen grain elevators and to maintain a grain

exchange whose members handle a large volume of grain shipments. The testimony adduced on the rehearing shows that the allowance of 1¼ cents per 100 pounds heretofore made to the Peavey elevators only, and more recently to the Trans-Mississippi Grain Company, has been extended to all other elevators at the cities above mentioned. Much testimony has been offered tending to show that the allowance is excessive and operates as a rebate. The statute itself has also been amended so as to include "transfer in transit," "storage," and "elevation" among the facilities of transportation which interstate carriers must or may provide for their shippers (sec. 1). But aside from these matters the material aspects of the proceeding remain unchanged. It will suffice therefore briefly to state the conclusions reached by us upon the rehearing without further reference to the history of the matter as disclosed upon the whole record.

Elevation, as commonly understood among elevator men and among buyers and sellers of grain, signifies the unloading of grain from cars, or from grain-carrying vessels, into a grain elevator and loading it out again after storage for a period of not to exceed ten days. The "treatment," or grading, cleaning, and clipping, of grain is not properly a part of "elevation" as the word is strictly used, and the retention of grain in an elevator beyond the period of ten days becomes storage and is not elevation. It is in this sense that the word is used in the amended statute. Without undertaking at this time definitely to decide to what extent under the amended act the furnishing of elevation as thus defined is a compulsory requirement, it is clear that the law recognizes elevation as a facility which a carrier may provide for the benefit of its shippers if it finds it to its interest to do so. This being the case, we see no warrant in law for holding, as is suggested, that such elevation can not be provided at destination and is lawful only for the transfer of grain in transit. The law seems to clothe carriers with the right to furnish elevation at any point where it may be a convenience to shippers. The only restriction imposed by the act in that connection is that the elevation offered, like any other service a carrier may hold out to shippers as an inducement to send their traffic over its line, must be open to all on equal and reasonable terms. It is true, as is said, that the usual

practice is for consignees to do their own unloading at destination. But clearly there is nothing in the law or in public policy that forbids a carrier to unload for them, if it does so for all shippers alike. Generally speaking, a carrier may build up its traffic by offering its shippers any facilities of that nature. We understand it to have been so held both by the courts and by this Commission.

Having the right under the law to provide elevation for its shippers it is not to be doubted that a railroad company may either construct and operate an elevator of its own, or may furnish elevation facilities to its shippers by making some arrangement with the owner of an elevator for such a service. The amount of the compensation or allowance that may be paid to the owner for rendering such a service is not a matter of concern either to shippers or to other carriers, unless in some way it enters into the rates charged on the grain traffic and thus makes the rates excessive, or unless by some device a portion of the allowance is returned to shippers and thus becomes a rebate. And, therefore, whether the allowance now made by the Union Pacific Railroad Company to the owners of the elevators at Council Bluffs and Kansas City be called an allowance for the prompt release of its equipment, or for the transfer of the grain in transit, or for elevation, we adhere to the view expressed in the original report and opinion of the Commission that such an arrangement, embracing as it now does all the available elevators at the points named and not being confined to the Peavey elevators only, is in itself not unlawful. By whatever name it may be called, the service actually rendered is in fact elevation and may be so regarded under the amended act. It must be understood, however, that if such elevation is furnished by the Union Pacific Railroad Company for the grain of one shipper over its lines, proper arrangements must be made by it for furnishing elevation to other shippers over its lines; for otherwise the company would subject itself to the charge of practicing an unjust and unlawful discrimination against other shippers who for any reason can not use the Peavey elevators.

The vice in the situation at Council Bluffs and Kansas City arises out of the fact that the Peavey interests, besides operating the elevators in question for the railroad company,

are also extensive buyers, sellers, and shippers of grain. If they were elevator men only, the amount of the allowances paid to them by the railroad company on the grain of other shippers would not have been the occasion of inquiry by the Commission, unless upon complaint by a shipper that the allowances entered into the rates and made them excessive or were being used covertly as a rebate. But being themselves dealers in grain, they perform a service for themselves and for their own grain, although operating the elevators under contract with the railroad company. It is for this reason that we still regard the arrangement as objectionable, although not necessarily and in itself unlawful. Such relations between a carrier and a shipper as the Peavey people enjoy with the Union Pacific Railroad Company, although more frank and open than the fictitious leases and contracts with elevator companies that are sometimes resorted to as a cover for rebates and other unlawful practices, nevertheless breed distrust and suspicion. Arrangements of that kind easily lead to abuses and ought not, therefore, to be encouraged. They not infrequently result in some unfair advantage to the shipper concerned. That is the case here. The record discloses that practically all the grain going into those particular elevators belongs to Peavey & Co. They therefore do the work under the contracts with the railroad company in a double capacity and with a twofold interest in the result. They are paid by the company for performing an elevation service for its shippers, and the service they render is chiefly in connection with their own grain. Besides the profit, often quite substantial, on the mixing of an inferior with a superior quality of their grain, thus raising the average grade of all and increasing its value, they receive an allowance for its elevation. The arrangement thus puts them on a special ground of advantage as buyers and sellers and shippers of grain. It ought, therefore, to be narrowly scrutinized and examined by this Commission and so rigidly readjusted under our order as to strip it of any possibility of working an injustice to other shippers or of resulting in a breach of the law. While we have no power under the statute to forbid a railroad company from contracting with an elevator owner

for such a service, yet if the owner is also a shipper we have the authority to so regulate and control the relations between them as to protect the rights of others and to enforce the observance of the law.

Granting, then, that the allowances were not shown to be excessive upon the prior investigation, do they now appear to be unreasonable in the light of all the facts and circumstances disclosed upon the rehearing? This question we are constrained to answer in the affirmative, and to hold that enough has been shown to call for a material reduction. It is true that under the terms of section 15 of the amended act to regulate commerce a shipper may receive, in the rates charged, a "just and reasonable" allowance from a carrier for any service or instrumentality furnished by him in connection with the transportation of his own property. This provision, however, must be read in connection with the other provisions of the law forbidding and making unlawful any arrangement or practice that results in an undue preference or an unjust discrimination in favor of one shipper as against others, or that results in a rebate or other departure from the lawfully published rates. And therefore, if the allowance involves a profit over and above the actual cost of the service rendered, it becomes, when made to a shipper, a rebate and an unlawful discrimination to the extent of the profit realized. It is not a rebate when it does not exceed the actual cost. But to avoid that fundamental objection, the actual cost of the service rendered must be the limit of the allowance.

We are satisfied from all the evidence now before us that the arrangement by the Union Pacific Railroad Company with the Peavey elevators at Council Bluffs and Kansas City, under which the latter get an allowance of 1¼ cents per 100 pounds for the prompt release of the car equipment of that line, or for elevation, or whatever the service may be called, results in an appreciable profit to Peavey & Co., which can be and is used to advantage by them as buyers and shippers. The record fairly discloses this in the superior price that they seem to be able to offer to producers in the country for their grain. And therefore the proper administration of this law, as well as common fairness to competing dealers in grain, requires a substantial abatement in the amount of the allow-

ance. The original contract between them, made for a long term of years, seems to have contemplated a reduction of the allowance to 1 cent per 100 pounds at the end of ten years, of which less than two years remain. This is a sufficient indication that the parties to the contract were themselves of the opinion that an allowance of 1 cent per 100 pounds, when it went into effect, would return a satisfactory profit over and above the actual cost of the service rendered. Moreover, our investigations have led us to the conclusion that such a service may be rendered with a reasonable and substantial profit on a charge of 1 cent. Under all these circumstances, and having regard to the letter and spirit of the law, which forbids a shipper in any form to accept or a carrier to give a rebate, we have concluded that the allowance should now be fixed at three-quarters of 1 cent per 100 pounds as the maximum to be paid for such service. We are satisfied from the information acquired in this and other investigations as to the charges and practices at other points where large quantities of grain are handled and transferred, that an allowance of three-quarters of 1 cent will fully and amply cover the actual cost of the elevation contemplated in the law, without returning a profit and thus becoming a rebate.

An order will be entered in accordance with these views.

ORDER.

Upon the foregoing report—

It is ordered, That the Union Pacific Railroad Company be, and it is hereby, notified and required to cease and desist on or before the 1st day of June, 1907, and for a period of at least two years thereafter abstain, from giving or paying 1¼ cents per 100 pounds as and for an allowance or compensation for service rendered in the transfer, release of car equipment, or elevation of grain at Council Bluffs, in the State of Iowa, or Kansas City, in the State of Missouri, or points or places in territory adjacent thereto, to any person, firm, association, company, or corporation, directly or indirectly, engaged or interested in the buying, selling, or shipment of grain, or to any elevator company or corporation owned in whole or in part, or in anywise, directly or indirectly, controlled, by one or more such persons, firms, associa-

tions, companies, or corporations so engaged or interested, directly or indirectly, in the buying or selling of grain; and more particularly to so cease and desist from giving or paying such allowance to the Omaha Elevator Company, the Midland Elevator Company, or to Peavey & Co.; and to further cease and desist at the time and for the period aforesaid from giving or paying any allowance or compensation for such service in excess of three-fourths of a cent per 100 pounds of grain, to said Omaha Elevator Company, the Midland Elevator Company, or to Peavey & Co., or to any person, firm, association, company, or corporation, directly or indirectly engaged or interested in the buying, selling, or shipment of grain at the places aforesaid or adjacent thereto, or to any elevator company or corporation owned in whole or in part, or directly or indirectly controlled, by one or more persons or corporations engaged or interested, directly or indirectly, in the buying, selling, or shipment of grain.

CLEMENTS, *Commissioner*, dissenting:

It is apparent that when this matter was first heard the Commission based its decision sustaining the legality of the elevator allowance to Peavey & Company largely upon the theory that the carrier had a right to unload its cars for the purpose of promptly releasing them at its terminus, and also to hire this to be done by another, and that, inasmuch as the law did not prohibit its employment of the owner of the freight himself to do the unloading, it followed that unless the allowance was so excessive, in view of the service rendered, as to show it to be a device for a rebate, it could not be condemned under the then existing law, although it did result in advantage to Peavey & Company over their competitors in buying, shipping, and selling grain. In other words, it was held, in substance, that the contract not being expressly forbidden by law, any resulting advantage accruing to Peavey & Company, if the allowance was not so excessive as to be a rebate, was not undue, and therefore not unlawful. The Commission said in the former decision "however objectionable the arrangement in question may appear from any point of view, we are convinced, rather against our original impression, that it can not be adjudged unlawful. * * * It is scarcely needful to add that

arrangements of the kind investigated in this proceeding are not favorably regarded." It is evident that the Commission, by its view of the law, then felt constrained to uphold the legality of the arrangement in question, although it felt that it was objectionable and of a kind not to be desired or encouraged, and the tenor of the report now made by the majority is to the same effect.

Peavey & Company are in the general grain business, buying, shipping, elevating, storing, cleaning, blending, and otherwise treating the grain in various ways and selling the same on their own account. They buy in the country and have numerous small elevators at various purchasing points into which the grain is first placed and then shipped from time to time to their larger terminal elevators, into which they load it, receiving the allowance in question. Practically all of the grain they unload is their own. It seems clear that the "elevation" which is defined in the act as a part of the transportation is only such elevation as is incident and necessary to the movement of the grain in transit. It must follow that Peavey & Company have an advantage to the amount of this allowance over competitors against whom they bid and buy at the grainfields, at least to the extent that such allowance exceeds the actual expense to them of the mere elevation transfer of the grain in transit. The service which they render for the carrier, and which it is bound to provide, if any, is so blended with the greater service which they render for themselves that it is impossible to tell what is the cost to them of the former, though it seems evident that the proposed allowance, as well as that in force, is large enough to cover much that the elevator company does for itself and from which it derives advantage and profit as a grain dealer. Indeed, it is difficult to see anything that the elevator company does in respect to shipments of grain which are not in good faith consigned through to actual destinations beyond which it must not necessarily do solely for itself.

On February 19, 1906, in the cases of the *New York, New Haven & Hartford Railroad Company, appellant*, v. *The Interstate Commerce Commission*, and *The Interstate Commerce Commission, appellant*, v. *The Chesapeake & Ohio Railway Company*, and the *New York, New Haven & Hartford Rail-*

road Company, which involved the same subject-matter, the Supreme Court of the United States, having heard them together, rendered one opinion, in which it is said:

> The all-embracing prohibition against either directly or indirectly charging less than the published rates shows that the purpose of the statute was to make the prohibition applicable to every method of dealing by a carrier by which the forbidden result could be brought about. If the public purpose which the statute was intended to accomplish be borne in mind, its meaning becomes, if possible, clearer. What was that purpose? It was to compel the carrier, as a public agent, to give equal treatment to all.

The prohibitions of the statute apply equally to an undue advantage or discrimination effected through the published tariff as well as to acts in disregard thereof. Applying the doctrine announced by the court in these cases to the matter before us we have now only to look to the results of the arrangement in question, irrespective of the fact that the parties are not expressly forbidden to contract between each other on the subject.

Section 1 of the act as amended August 28, 1906, defining transportation, expressly provides as follows: "and it shall be the duty of every carrier subject to the provisions of this act to provide and furnish such transportation upon reasonable request therefor."

The provision in section 15 for reasonable allowance to the owner of the property by the carrier for any instrumentality or service in connection with such transportation is at most permissive. Under the broad and wholesome principles announced by the court a carrier should neither be permitted to plead its own failure, to itself furnish the necessary transportation facilities as commanded by the statute, nor any undertaking on its part to furnish something beyond its legal obligations, to justify a practice which culminates in the "forbidden result" of unjust advantage and discrimination. The carrier should itself afford the transportation and perform all of its legal obligations by its own services and instrumentalities. Neither the services nor instrumentalities of the shipper should be employed in the transportation of his own freight by the carrier. Such a practice will always be a hotbed for the propagation of discriminations difficult of definite proof. The opinion of the majority fixes the cost of the service rendered by the shipper as the limit which

he may be lawfully allowed. It requires no argument to show that the cost to the shipper of performing the services involved is impossible of definite ascertainment, and will vary from time to time. Yet, if by reason of caution not to reduce the allowance below cost the Commission shall leave it one-quarter or one-eighth of a cent above cost, the vice of discrimination is still there, even when tested by the rule stated in the majority report; nor is argument necessary to show that a large grain dealer, having the constant advantage of even this margin, can so far overreach his competitors as to largely monopolize and control the business.

Being convinced that the arrangement here involved necessarily results in undue advantage to Peavey & Company as against those with whom they compete in buying grain, and particularly those who, not being elevator men, desire to ship grain to Kansas City, Omaha, or Council Bluffs for use there, or to markets beyond, without elevation at the places named, I think the arrangement is unlawful. The effort to prevent the extension of this and similar practices by admonition or advice will not prove effective. The sanction of this arrangement will prove the prolific excuse, if not the necessity, for the continuance and extension of similar devices fruitful of discrimination and friction on other lines of railway and at other places. To cut it out would cure a multitude of evils.

LANE, *Commissioner*, dissenting:

The somewhat complex Peavey interests herein involved I shall refer to as the Peavey Company, and further, for sake of simplicity, will take Omaha as a typical point. The problem presented may then be stated in this form: The Peavey Company, grain buyer and elevator owner, purchases grain at country points, sends it over the Union Pacific Railroad to Omaha, where it is unloaded into the Peavey elevator. The Peavey Company pays the regular rate at Omaha, but the Union Pacific refunds 1¼ cents on each 100 pounds for unloading grain from the cars. Is the Union Pacific justified in giving this allowance to the Peavey elevator?

It was held by the Commission upon the original hearing that such an allowance, made under a special and secret contract between the Union Pacific and the Peavey Company,

was legal. A motion for a rehearing was made by certain interested carriers, but before this rehearing was had the Union Pacific filed a tariff extending this allowance to all elevators at Omaha, Kansas City, and certain other points. Under this tariff the allowance is made to grain "transferred by elevators." The sole defense of the Union Pacific is that the grain is in transit, and that transfer in transit is recognized by law as a part of transportation which a railroad may provide for, either by facilities of its own or by facilities which it otherwise procures.

I can justify as legal neither the Peavey contract nor the published tariff which extends the favor of the contract to a larger number of elevators. Both are discriminatory as against all shippers into Omaha excepting those who own elevators and who, for their own purposes as grain dealers, ship the grain to Omaha and there handle it, treat it, and sell it. That this is so seems to me evident from the simplest statement of the facts. The Peavey Company buys grain on the line of the Union Pacific and takes out bill of lading, giving St. Louis as its destination. Why it takes such billing no one can explain. It receives no better rate by reason of following this procedure. The St. Louis billing is, in fact, a sham. It serves no purpose save to give color to the pretense that the grain is on its way to St. Louis and is properly subject to transfer at Omaha. Mr. Munroe, traffic manager of the Union Pacific, testified that his road handles the grain on a local way bill to Omaha, and that upon delivery at Omaha the through bill of lading is absolutely retired. Omaha is the destination of the grain; not its point of ultimate consumption, perhaps, but its destination from an immediate transportation standpoint. Therefore, as it goes out of the possession of the railroad at Omaha and out of the control of any carrier, it seems to me conclusive that it is not transferred in transit.

If, then, the service rendered is not transfer in transit, what may that service be called which the elevators perform? The prevailing opinion answers this question by calling it elevation, which it defines as unloading grain from cars into a grain elevator and loading it out again after a period of not to exceed ten days, which service, however, "like any other service

offered by the carriers to shippers must be open to all on equal and reasonable terms." To this admirable definition I take no exception, but its applicability to the facts of this case is not altogether clear. Neither the provisions of the tariff nor of the contract conform to this definition. The effect of the majority opinion is to legalize the secret contract with the Peavey Company. This contract certainly had nothing to do with a service "open to all." Other elevators at certain Union Pacific termini are also now entitled to this unloading allowance, but the Union Pacific in none of its tariffs offers elevation to grain shippers. It owns no elevator at these points and it holds none under lease, nor does it have an arrangement with any elevator by which the farmer or the commission man or the independent buyer may secure elevation of his grain when carried over Union Pacific rails. All that the Union Pacific has agreed to do, under the fairest construction of its tariffs, is to give to those grain shippers who are fortunate enough to control elevators at Omaha a refund of one and one-quarter cents per hundred pounds for unloading their own grain. The railroad pays the elevator man for unloading his cars, and does not pay the commission man or the miller. This is not what I would designate as an offer of elevation "open to all on equal and reasonable terms." A carrier may certainly provide for unloading "if it does so for all shippers alike," but that is precisely what, in my opinion, the Union Pacific does not undertake to do.

The argument of the prevailing opinion may be thus illustrated: Armour buys a carload of dressed meat in the West and ships it to Omaha, where he places it in a refrigerator awaiting further disposition. Most of this meat is destined to be consumed elsewhere, but he holds it in Omaha as a distributing point and for treatment. Is he entitled to an allowance for putting it into his refrigerator? Or perhaps a more perfect illustration would be the purchase of a train load of oranges in California which are shipped into Omaha and there taken out of the cars by the owner, sorted, cleaned, and graded, and, we will assume, shipped eventually to such other markets as he may determine. Should the owner of these oranges, which come over the Union Pacific, receive a refund of a certain amount for unloading the cars at Omaha?

If the Peavey Company bought this grain for shipment directly to St. Louis, and the railroad, for the purpose of relieving its equipment at Omaha, secured an elevator to make the transfer from its cars into those of another road, I would think it proper that the cost of such actual transfer should be borne by the road, or perhaps be divided between the two roads interested, because the grain would be always within the control and possession of the carrier, and the service rendered would be but a transportation service to which all shippers were equally entitled. There are no such facts, however, presented in this case. The billing is confessedly false, the shipment is local, and the so-called transfer given is simply an incidental result of the ordinary prosecution of the grain dealer's business. No transportation service is rendered by the owner of the property. He does what he must do if he wishes the benefit of handling the grain—removes his grain from the car. The principle of this practice is wrong, no matter whether it extends to one elevator in a city or to all, and no matter what the amount of the allowance may be. It gives a preference in rates to the elevator owner as against everyone else who wishes to ship grain into that market. It is a modern modification of an ancient rebating scheme.

COCKRELL, *Commissioner*, did not participate in the hearing or in the decision of this case.

EXHIBIT NO 3.

No. 687.

IN THE MATTER OF ALLOWANCES TO ELEVATORS BY THE UNION PACIFIC RAILROAD COMPANY.

Decided April 14, 1908.

UPON PETITION OF THE CHICAGO BOARD OF TRADE AND OTHERS FOR A REHEARING, THE PROCEEDING HEREIN IS REOPENED FOR FURTHER CONSIDERATION.

Davis, Kellogg & Severance for Chicago Great Western Railway Company.

Gardiner Lathrop for Atchison, Topeka & Santa Fe Railway Company.

J. W. Blythe, C. J. Green, and *J. E. Kelby* for Chicago, Burlington & Quincy Railway Company.

J. N. Baldwin for Union Pacific Railroad Company.

Hagerman & Koon for Peavey & Company.

John H. Marble for the Commission.

SUPPLEMENTAL REPORT OF THE COMMISSION.

HARLAN, *Commissioner:*

From numerous protests and complaints that have reached the Commission since the handing down of its last decision in this proceeding on April 9, 1907, it is apparent that there has been a wide extension among interstate carriers of the payment of the so-called elevator allowances on shipments of grain, and that there is a general feeling that the practice results in an unlawful discrimination. The Chicago Board of Trade and other interests largely concerned in the shipment

of grain have asked for the further consideration of the matter. Under these circumstances we have concluded in the public interest to reopen the proceeding and to set it down for further argument on May 8 next in the hearing room of the Commission at Washington. Of this action the parties hereto have already been advised. It seems unnecessary to take further evidence and the matter will therefore be considered on the present record. It is the desire of the Commission that counsel shall again argue the general question of the legality of the contract of the Union Pacific Railroad Company with Peavey & Company and the lawfulness of the allowances that are made to the latter company at Council Bluffs and Kansas City under the terms of that contract.

In connection with the reexamination of these general questions the Commission desires the benefit of the views of counsel with respect to two points which have been strongly urged upon its attention and which may be stated briefly as follows:

1. The clipping, cleaning, grading, weighing, and mixing of grain are services that have no relation to transportation, but are of commercial advantage to the shipper of the grain. If performed or paid for by a carrier at one place where it has put an elevator under contract, as with Peavey & Company at Council Bluffs and Kansas City, is it not an unlawful discrimination not to perform or to pay for similar services elsewhere on its line?

2. Wheat and other grains are dealt in upon the great grain markets of the country on fractions as small as one-eighth of one cent per bushel. A fluctuation of that amount often suffices to effect or prevent sales. And slight differences in the transportation rates are sufficient to turn a movement of grain from one market to another. In other words, no commodity that enters so largely into the commerce of the country is more sensitive than grain to fluctuations in price or rates. If therefore a shipper receives from a carrier, in connection with the transportation of his grain, any service or privilege that results in a benefit to him to the extent even of a small fraction of a cent per bushel, it gives him an advantage which can readily be turned to his profit. While some grain is taken directly to the mills, the bulk of the traffic must pass either through

public or private elevators. A grain market can be maintained only by the use of elevators. A grain dealer must therefore have his grain unloaded into a public elevator and pay its storage charges, or must handle it in his own elevator and pay the cost of operation. In other words, Peavey & Company, for the successful conduct of their business as dealers in grain, must either use a public elevator or provide themselves with one of their own. In either event a substantial expense item is involved. Upon these facts it is insisted that a contract, such as the one here involved, when made with a dealer in grain who handles his own wheat, results in an unlawful discrimination, whatever may be the amount of the allowance and whether it be in excess of the cost of the service or not; for, as Peavey & Company can not conduct their business as grain buyers and dealers without using a public elevator and paying its charges, or without owning their own elevator and paying the cost of operation, any amount, be it small or large, contributed by the Union Pacific Railroad Company to the cost of running their elevator must necessarily operate, *pro tanto*, as a special concession in their favor. It is contended that any aid received by them from the Union Pacific Railroad Company, whether sufficient to cover the cost of running the elevator or not, even though it amounts to but a small fraction of a cent per bushel, really results in giving to Peavey & Company a benefit which, although under the present tariffs of the Union Pacific Railroad Company is shared by other grain dealers in business at Council Bluffs, Omaha, and Kansas City, is nevertheless denied to grain dealers at other points on the line of that company. Such dealers have to bear the entire burden of running their elevators, or pay for the elevation service on their grain when performed by a public elevator. And this, it is earnestly contended, is not only an unlawful discrimination against them, but against the several communities in which they conduct their grain business.

In rearguing the issues herein, counsel are requested to give some consideration to these suggestions.

EXHIBIT NO. 4

No. 687.

IN THE MATTER OF ALLOWANCES TO ELEVATORS BY THE UNION PACIFIC RAILROAD COMPANY.

Submitted May 22, 1908. Decided June 29, 1908.

Advantages that are unlawful may be enjoyed in ways that do not involve the direct payment of rebates. An allowance by the Union Pacific Railroad Company to Peavey & Company, under the contract between them, when made on their own grain which has been mixed, treated, stored, weighed, or inspected in any elevator belonging to Peavey & Company, or which has been reshipped out of any of their elevators more than ten days after its receipt therein, amounts *pro tanto* to a contribution by the Union Pacific Railroad Company to Peavey & Company of the cost of securing the commercial benefits growing out of the mixing, treating, storing, weighing, or inspection of their grain, and is an undue preference and therefore unlawful.

C. A. Severance for the Receiver of Chicago Great Western Railway Company.

Gardiner Lathrop and *Robert Dunlap* for Atchison, Topeka & Santa Fe Railway Company.

Hale Holden for Chicago, Burlington & Quincy Railway Company.

F. C. Dillard for Union Pacific Railroad Company.

Hagerman & Koon for Peavey & Company.

E. E. Williamson for Cincinnati Chamber of Commerce.

Henry S. Robbins for Chicago Board of Trade.

Report of the Commission on Rehearing.

Harlan, *Commissioner:*

The history of this proceeding and the facts shown of record are set forth in detail in the two opinions that have heretofore been announced by the Commission, in 10 I. C. C. Rep., 309, and 12 I. C. C. Rep., 85. It will not be necessary therefore to make a further statement of facts. The matter has come on again for rehearing upon the petition of the Chicago Board of Trade, and upon numerous protests from other quarters, indicating an extension of the practice of making elevation allowances and alleging discriminations and other evils arising therefrom.

While adhering to the general principles expressed in the last report of the Commission in this proceeding, further reflection and further knowledge of the actual operation of the contract between Peavey & Company and the Union Pacific Railroad Company have led us to the conclusion that the reduction under our previous order of the allowance of 1¼ cents per hundred pounds to three-quarters of 1 cent does not reach far enough and has not sufficed to cure the evil of which complaint was made. That reduction was made on the theory that an allowance of 1¼ cents per hundred pounds was more than the cost to Peavey & Company of the service performed on their grain and was therefore an unlawful rebate. But advantages that are unlawful may be enjoyed in ways that do not involve the direct payment of rebates. And we think that Peavey & Company do enjoy in the actual operation of their contract advantages that do not accrue to other shippers of grain. The mixing of grain is said to be one of the largest sources of profit to a grain dealer. By mixing a carload of inferior grain with a carload of grain of higher grade the aggregate value of the two carloads is increased and the dealer's profits from the sale are larger than they would be if the two carloads were sold seperately. The storage of grain beyond the elevation period of ten days is also of commercial value to grain dealers. The "treatment" of grain is of advantage to them in that it results in enhancing its value. Weighing and inspection are also of advantage to the owner of the grain. As was expressly stated in our last report, such services are commercial services and are in no sense a part of elevation as

defined in the act to regulate commerce. If, therefore, the Union Pacific Railroad Company pays to Peavey & Company an allowance of three-fourths of 1 cent, or of any other amount however small, on grain belonging to them which has been mixed, treated, stored, weighed, or inspected in their elevators, it amounts *pro tanto* to a contribution by the Union Pacific Railroad Company to Peavey & Company of the cost of securing these commercial results and benefits. The allowance therefore not only results in an undue preference when paid on grain belonging to the owner of an elevator thus under contract, but, in effect, is also an unlawful rebate, unless confined to grain that is reshipped within the elevation period of ten days and has not been mixed, treated, weighed, or inspected.

No way has been suggested by which the Union Pacific Railroad Company may avail itself of the Peavey elevators under the contract in question without giving to Peavey & Company and to their grain the commercial advantages alluded to, and these advantages we regard as an undue and an unlawful preference. We therefore hold that the practice of the Union Pacific Railroad Company in paying to Peavey & Company an allowance under such circumstances upon their own grain is unlawful. An order will be entered in accordance with these views.

PROUTY, *Commissioner*, concurs in the result; and LANE, *Commissioner*, concurs in the conclusion that the allowance is unlawful.

ORDER.

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 29th day of June, A. D. 1908.

Present:

MARTIN A. KNAPP,
JUDSON C. CLEMENTS,
CHARLES A. PROUTY,
FRANCIS M. COCKRELL,
FRANKLIN K. LANE,
EDGAR E. CLARK,
JAMES S. HARLAN,
} Commissioners.

No. 687.

IN THE MATTER OF ALLOWANCES TO ELEVATORS BY THE UNION PACIFIC RAILROAD COMPANY.

Upon the foregoing report—

It is ordered, That the Union Pacific Railroad Company be, and it is hereby, notified and required forthwith to cease and desist for a period of two years from paying any allowance to Peavey & Company on their own grain received into any of their elevators at Kansas City and Council Bluffs (or on grain so received in any of said elevators in which they have any direct or indirect ownership or interest) that is not reshipped out of said elevators within ten (10) days after it has been received therein; and to cease and desist from paying any allowance to Peavey & Company on grain belonging to them, or in which they have any direct or indirect ownership or interest, that has been mixed, treated, weighed, or inspected in any of their said elevators at Kansas City and Council Bluffs.

EXHIBIT No. 5.

No. 1239.

TRAFFIC BUREAU, MERCHANTS' EXCHANGE OF ST. LOUIS,

v.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY.

No. 1240.

SAME

v.

MISSOURI PACIFIC RAILWAY COMPANY.

No. 1241.

SAME

v.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY.

No. 1263.

SAME

v.

ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY.

No. 1267.

SAME.

v.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY.

Submitted December 4, 1907. Decided June 29, 1908.

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1. A railroad company by granting a privilege which, although ostensibly open to the whole public, can, in the nature of things, only be taken advantage of by certain shippers, creates thereby a discrimination which may or may not be undue, according to the circumstances in each case.
2. The payment of an elevation allowance of ¾ of 1 cent per 100 pounds to elevators located upon the Missouri River is an undue and unlawful discrimination.

J. C. Lincoln for complainant.

Hale Holden and *O. M. Spencer* for Chicago, Burlington & Quincy Railroad Company.

E. B. Pierce for Chicago, Rock Island & Pacific Railway Company and St. Louis & San Francisco Railroad Company.

A. G. Cochran and *F. A. Cline* for Missouri Pacific Railway Company.

J. M. Bryson for Missouri, Kansas & Texas Railway Company.

REPORT OF THE COMMISSION.

PROUTY, *Commissioner*:

The above cases all involve the same question and were heard together, the subject of controversy being the so-called elevator allowance or transfer charge paid by the defendants at the Missouri River. The petition is filed by the Traffic Bureau, Merchants' Exchange of St. Louis, an organization of the business interests of that city, and is in favor of the handlers of grain at that market. The exact point raised will be best understood by a brief statement of the manner in which grain is handled and an application of these methods to a particular shipment.

Grain in the states west of the Missouri River is usually bought in the country by the country elevator. In such case, the price of the grain is agreed upon and the grain is weighed and taken into the elevator, the transaction being thus completed so far as the farmer is concerned.

It sometimes happens that the farmer puts his grain on store in the elevator, subject to order for future shipment, and he also sometimes sells to what is known as the "track buyer," in which case the grain is delivered not into an elevator, but directly from the wagon into the car.

1.42

The owners of country elevators often have what are known as terminal elevators located at primary markets, into which and through which they handle grain from their country houses, but it also often happens that the country elevator has no such connection with any terminal elevator. In this event the grain is either sold f. o. b. the car at the country station or is shipped to some market to be disposed of. In either case it is usually sold upon the grade, inspection, and weight of the market to which it is shipped. All grain shipped to a particular market to be sold and settled for according to the grade, inspection, and the weight of that market must of necessity be elevated, since it can not, as a practical matter, be weighed in any other manner.

It will be seen, therefore, that in the ordinary course of business all grain must be elevated at the market upon which it is handled, excepting only such grain as is sold in the car for shipment beyond. This grain may be sold upon sample or it may be inspected and graded in the car. It can not be weighed, and the amount of the grain so dealt in is small. There is another and more important exception, viz, grain bought by the mill directly from the field.

The defendants, acting upon a decision of this Commission in the so-called Peavey case—*In the Matter of Allowances to Elevators by the Union Pacific R. R. Co.*, 12 I. C. C. Rep., 85—have established what they term a transfer charge, but what is ordinarily known among grain men as an elevator allowance at the Missouri River of ¾ of 1 cent per 100 pounds. The railway tariff provides that this payment shall be made to the elevator performing the service and not to the owner of the grain; but the testimony in the case before us shows that, as a practical matter, the operator of the elevator at Missouri River points is almost without exception the owner of the grain, so that in fact the application of this tariff enables the grain owner at the Missouri River to obtain from the railroad company ¾ of 1 cent per 100 pounds upon all grain shipped by him into that market. The same result follows if the owner of the grain is not also the owner of an elevator, since the elevator which performs the service will give him the benefit of the ¾ of 1 cent which it obtains from the railroad company.

This allowance is treated upon the tariffs of the railroad companies as a transfer charge and is never paid unless the

grain is shipped out of the elevator. In the case of the Union Pacific Company the charge is paid by that company upon satisfactory evidence that the grain has gone forward. All other railroad companies operating west of the Missouri River have lines extending beyond that river to the east, and it is for the interest of those companies that the grain should be carried beyond over their own lines. The rails of the Chicago Great Western and certain other lines begin at the Missouri River, and unless the grain is elevated and sent forward from that market these lines receive none of the business. These competitive conditions compel the payment by all lines of the same allowance made by the Union Pacific, but the payment is made in all other instances by the outbound and not by the inbound carrier.

If, now, we apply the published tariffs of these defendants, including this elevation allowance or transfer charge, to an actual movement of grain through an elevator at Omaha as compared with a similar movement through an elevator at St. Louis, the discrimination complained of becomes mainfest. For this purpose we will assume a shipment from point A in Nebraska to the consumer at point B in Illinois. The rate from A to Omaha is 10 cents, from the Missouri River to St. Louis 9 cents, and from St. Louis or the Mississippi River to B 5 cents.

If, now, the consumer at B should himself purchase a carload of grain at A, the cost of transporting that grain would be 24 cents per 100 pounds. In point of fact, the consumer at B seldom, if ever, buys in the country at A, but for various reasons which need not be stated he purchases of an intermediate grain man at some point like Omaha or St. Louis. We will assume first that the carload is handled through Omaha and that the grain dealer at Omaha owns and operates an elevator.

The rate paid in this case, as before, is 10 cents to Omaha, 9 cents to the Mississippi River, and 5 cents to B, making a through transportation charge of 24 cents; but the grain dealer at Omaha now receives from the railroad company an allowance of ¾ of 1 cent. As between himself and the railroad, therefore, he has paid but 23¼ cents per 100 pounds.

Assume, now, that the shipment, instead of passing through the elevator at Omaha, is handled by a grain dealer

who also owns and operates his own elevator at St. Louis. This dealer pays this same transportation charge, 10 cents to Omaha, 9 cents to St. Louis, and 5 cents to B, making 24 cents, and he receives nothing whatever from the railroad company.

It is perfectly evident that it costs the St. Louis grain dealer just ¾ of 1 cent per 100 pounds more to lay this grain down at B than it costs the grain dealer at Omaha, if we assume that the expense of operating the elevator at Omaha and at St. Louis is the same.

In point of fact, the grain dealer at St. Louis does not usually own his elevator, but uses the public elevator, paying for this service one-half cent per bushel, or slightly more than ¾ of 1 cent per 100 pounds, but the same result must follow if we assume that the grain dealer at Omaha, instead of owning and operating his elevator, procures the service from some other elevator, for in that case the railroad company would pay the elevator ¾ of 1 cent per 100 pounds, and the elevator would perform the service without charge to the Omaha dealer.

In whatever way the matter is considered, it must be evident that the dealer upon the Missouri River has the advantage of the dealer at St. Louis by exactly the amount of this elevation charge, everything else being equal.

There can be no doubt upon the above facts that this elevation allowance works a discrimination against the market of St. Louis and in favor of the markets at various Missouri River points where the allowance is made. The real question is whether that discrimination is undue, and therefore unlawful, and what, if so, the Commission can do to remove it.

These defendants all place their defense upon the ground that competitive conditions, not existing at St. Louis, force the payment of this elevation allowance at the Missouri River. They assert that the Union Pacific, acting under the decision of the Commission in the Peavey case just referred to, pays at Omaha and at Kansas City this allowance of ¾ of 1 cent, and that other competing carriers are obliged to make the same allowance. Since there is no such competitive condition at St. Louis, they are not compelled to pay this charge, and therefore decline to do so.

It is probably true that the payment of an allowance of this sort by one railroad at Omaha or Kansas City would force a similar payment by competing carriers, and this Commission has itself held that if a carrier pays this charge at Kansas City, it can not decline to pay it at Atchison. *Atchison* v. *Missouri Pac. Ry. Co. et al.*, 12 I. C. C. Rep., 111. It may well be, therefore, that the action of the Union Pacific at Omaha and Kansas City does force the payment of this allowance at the Missouri River markets, and it becomes proper, therefore, in the light of the present record, to reexamine our decision in the Peavey case upon which these payments are justified by the defendants.

That proceeding was originally undertaken by the Commission upon its own motion, but in consequence of the suggestion of certain competing carriers. It had been alleged that the Union Pacific under a secret contract with Peavey & Company was paying to that company certain allowances for the unloading of grain, which amounted to a rebate in violation of the act to regulate commerce. The facts as developed in that investigation and upon which the Commission based its decision were these:

The Union Pacific Railroad, in the operation of its lines which lead into and stop at Omaha and Kansas City, found it necessary to provide at these points warehouses into which grain shipped by them from the fields of Nebraska and Kansas could be unloaded so that their own cars might be released and promptly returned, and from which the grain could be loaded into cars of its connections when it went forward toward the east. Instead of erecting and operating such warehouses itself, it had entered into a contract with Peavey & Company by which that company provided these facilities. The Commission found, nor could there be any doubt as to the accuracy of these findings, both from the testimony of the Union Pacific and of other carriers operating to the west of the Missouri River, that previous to 1899, when the contract was executed, and at that date, it was absolutely essential in the operation of the Union Pacific Railroad to provide such storage and transfer facilities at Omaha and in a less degree at Kansas City, and that the Union Pacific had entered into this contract with Peavey & Company in good faith and for the sole purpose, not of giving

to Peavey & Company any undue or illegal preference, but of providing those facilities which it must otherwise have furnished for itself. We further found, and the testimony was not fairly doubtful upon this point, that the price specified in the contract of 1¼ cents per 100 pounds was not unreasonably high. Upon this statement of facts we held that the execution of the contract was legal and that the payments under the contract were not in violation of the act to regulate commerce.

It will be noted that the Commission treated this purely from the standpoint of the railroad as a storage and transfer proposition. The opinion points out that the contract is for the advantage of Peavey & Company, since in its actual workings the service of storage and transfer performed by that company for the Union Pacific Railroad was to a large extent one which Peavey & Company as grain dealers must perform for themselves, so that they were to this extent paid for the handling of their own grain. But the Commission called attention to the fact that the result of this advantage to Peavey & Company had not been sufficient to provoke protest from the competitors of that company, since not competing grain dealers but competing railways had brought the matter to the attention of the Commission and were present before the Commission urging that the contract be condemned. The last paragraph of the opinion of the Commission in the original case is as follows:

> It is scarcely needful to add that arrangements of the kind investigated in this proceeding are not favorably regarded. When anything directly connected with the public service which a carrier is bound or undertakes to perform is farmed out, so to speak, to one of its own shippers, the relation thereby brought about is likely to excite distrust and to be looked upon with suspicion. The provisions of the regulating statute may not be violated *because any resulting discrimination may not be undue*, but the situation created can not be wholly satisfactory. Under existing conditions the transfer of grain through elevators at various points seems to be a virtual necessity both to the grain carrier and the grain dealer; but we are not unmindful of the fact that the persons to whom these elevator allowances are made appear to control a very large share of the grain business. As a practical matter this may be unavoidable, nor is it necessarily unlawful, but the methods adopted and now in vogue in this regard are liable to abuse and therefore not to be encouraged. In this case, however, we are persuaded, upon the facts disclosed and our view of the law, that no requirement of the act has been disregarded and that the respondent carrier is entitled to a dismissal of the complaint.

The whole case fairly shows that the Commission then realized that the operation of this contract might result in such discrimination in favor of Peavey & Company as would be undue and therefore unfawful, but were of the opinion that upon the record before us no such quality of undueness had been made to appear.

It should be further noted that this report of the Commission was promulgated before the decision of the Supreme Court of the United States in *Interstate Commerce Commission* v. *Chesapeake & Ohio Ry. Co.*, 200 U. S., 361. While there could be no question as to the necessity of these transfer facilities at the time the contract was made, it was evident that they were much less needed when the case was heard, in 1903, so that there might have been some ground for claiming that while this contract was lawful when made it had become unlawful. But the Commission hestitated to say, even if that were true, that a contract which was not only legal but apparently justifiable at the time of its execution and upon the strength of which investments had been made could become illegal by change of conditions. That case holds apparently that whenever the execution of a contract violates the provisions of the act to regulate commerce the contract itself becomes void and its performance unlawful.

When the Peavey case came before the Commission the second time every condition in any sense controlling had changed. *In the Matter of Allowances to Elevators by the Union Pacific Railroad Company*, 12 I. C. C. Rep., 85.

While the Union Pacific as an operating company still found it desirable and at times, perhaps, necessary to have at Omaha elevators into which its cars could be unloaded and thereby released, still its equipment then passed freely onto the lines of other railroads and the equipment of other railroads moved freely over its lines. It appeared in the testimony that cars coming in from the field were frequently unloaded into the elevator and then loaded out for the east without being switched from the elevator. It also appeared that a great number of its cars coming into the elevator from the west were foreign equipment. Elevators had multiplied at Omaha, and the Union Pacific Company, even if the Peavey elevator had not been in existence, would have found

no occasion at the time of our last report, in April, 1907, to construct an elevator of its own at that point.

The change in the traffic situation was even more marked than that in operating conditions. In 1903 the rate from a point in Nebraska, where this grain originated, through Omaha to some eastern market was less than the sum of the rates to Omaha and from Omaha. If the Union Pacific handled this business through Omaha, as it must, it was necessary to do so upon a joint through rate and as a strictly through proposition. It was, therefore, in fact as well as in theory necessary that it should in some way provide for the transfer of the grain from its cars to the cars of its connections. In 1906 this was not so. After a period of warfare the Chicago Great Western had secured the adoption at Omaha of the same system of rate-making which had long prevailed at Kansas City, so that the combination upon Omaha was the same as the through rate via Omaha or via any point across the Missouri River around Omaha. Commercially it was certian that the grain would subsequently go forward for the most part to some other destination, for the consumption at Omaha was small in comparison with the total receipts, but from a transportation viewpoint the service was a strictly local one upon a local bill of lading and under a local rate. The Union Pacific neither knew nor cared what the subsequent destination of the grain was. Hence the interest of that company in the transaction had changed. Before it had been essential that this grain should be brought to Omaha upon a through rate and sent forward upon that rate. Now it was only essential that it should be marketed at Omaha. Conditions must be so adjusted as to make it desirable for the owner to ship his grain into Omaha rather than to ship it via some through line around Omaha; and these conditions were met when Omaha became a grain market—in other words, when the grain was elevated by the owner at Omaha.

For the purpose of accomplishing this end the Union Pacific Company has extended its payment of this 1¼ cents to all elevators at Omaha or Council Bluffs which performed this service. In other words, it now made payment of this sum not by virtue of any contract with Peavey & Company, but in

the adoption of a policy which would secure the handling of the grain at that point.

While the case presented upon the second record was entirely different from that presented upon the first and must be disposed of upon entirely different considerations, it still seemed to a majority of the Commission that the payment of these allowances ought, under the circumstances, to be permitted. The reasons which moved the writer of this report to that opinion are not fully stated in the report then published, and may be briefly given here.

It is evident that the discrimination arising out of the payment of such an allowance might be of several different kinds, and for the purpose of defining these varieties of preference we may take the concrete case of a payment to Peavey & Company.

(*a*) That company might derive an advantage from the fact that the amount paid for the service was greater than the cost of the service itself. If they received more than the expense to them, they would manifestly obtain an advantage over a competitor who did not perform the service by exactly the amount of difference between the sum paid and the cost to them.

Now, when we reduced the charge from 1¼ cents to ¾ of 1 cent per 100 pounds it seemed reasonably certain that we had eliminated that source of discrimination, if it ever existed, since the evidence in the Peavey case, as well as in other cases before the Commission, strongly tended to show that the fair cost of performing this service equals or exceeds the latter sum. It should be added, however, that information coming to the Commission since indicates that even ¾ of 1 cent may be too high.

(*b*) There is an entirely different discrimination arising from the fact that Peavey & Company as grain dealers must have these facilities of elevation; that the service which they perform for the railroad company also involves a service necessary to themselves as grain handlers, and that therefore the railroad pays them for a service in connection with their own grain, which their competitor must furnish at his own cost. This is perfectly seen by assuming that some elevator is located upon the line of the Union Pacific at

Omaha or Council Bluffs which does not receive the allowance.

It must be kept in mind that this elevator service is absolutely essential to the business of Peavey & Company. They could not transact a grain business at Omaha without it. The evidence shows that practically all the grain handled into the elevator is their own; hence the service which they perform in storing and transferring this grain for the Union Pacific differs in no respect from the service which they would perform, except in rare instances, if they were not operating under this contract.

The competitor of Peavey & Company also owns a line of country houses upon the Union Pacific with a terminal elevator located at Omaha and performs for the Union Pacific in the handling of its business exactly the same service as does Peavey & Company, and probably at substantially the same expense; yet Peavey & Company are paid 1¼ cents per 100 pounds while their competitor receives nothing at all. This allowance, as we have already seen, is often more than the entire profit from the handling of the grain; hence, as a practical matter, there arises in the working out of this contract a discrimination in favor of Peavey & Company as against other elevators at Omaha.

Now, when the Union Pacific Company extended the payment of this elevator allowance to all elevators in Omaha it thereby removed this second form of discrimination. The competitor of Peavey & Company at Omaha or Council Bluffs would now receive exactly as much as was paid to that company under its contract, and hence payment under that contract no longer worked discrimination between the owners of elevators. Under our second holding, as applied to conditions then existing, neither the first nor the second form of discrimination could exist.

(*c*) A third discrimination still remains. While this is termed a transfer charge upon the tariff and is only paid upon grain which actually moves out from Omaha, it is, in fact, under actual conditions, an elevator allowance, and is paid by the Union Pacific for the purpose of inducing the elevation of grain at Omaha. In other words, the Union Pacific pays for the unloading of a carload of grain when discharged into an elevator and requires the consignee to

pay for the unloading if that grain is unloaded by any other means. This is a clear discrimination in favor of the elevator against the consignee who does not employ the service of an elevator in the unloading of his grain.

It sometimes happens that grain is sold for shipment beyond, without being unloaded at Omaha. This business is transacted by a commission man, who comes into competition with the dealer operating through the elevator, and generally the owner of the elevator. Here is a plain preference in favor of the elevator and against the shipper who has no occasion to employ that facility. The same discrimination would arise against a shipper who, though desiring to use an elevator, did not wish to use it at Omaha.

The existence of this form of discrimination was clearly apparent upon the hearing and is prominently referred to in the reports of both dissenting Commissioners. It did not seem to the writer at that time a sufficient ground for holding the payment of these allowances to be unlawful. Railways can not be operated without more or less discrimination. The act to regulate commerce does not attempt to prohibit all discrimination, but only that which is undue. It was the opinion of the writer that under all the circumstances this discrimination ought not to be held undue, for the following reasons, among others:

Elevation facilities are absolutely essential to the proper handling of grain. There must be the country elevator and the terminal elevator; and it is for the interest of all parties—producer, carrier, and consumer—that these facilities shall be ample. In no other way can the farmer dispose of his product and obtain his money for it when he desires. In no other way can the railroad economically handle this grain from the producer to its final destination. In the interest of the general public, therefore, the construction of ample elevator capacity should be in all proper ways encouraged.

The Union Pacific has a special and peculiar interest in the existence of extensive elevator facilities at Omaha. As repeatedly said, its eastern terminus is here. Its haul of grain from the country station is comparatively short. If its cars can be promptly unloaded and promptly returned to the field this grain can be moved by it when desired. Otherwise, if its equipment goes beyond its own lines, delays and

congestion may occur. It is perfectly plain that, looking at this matter from a purely operating standpoint, the interests of the Union Pacific demand ample storage facilities at Omaha and Council Bluffs, into which grain can be temporarily put when operating conditions are such that it can not be sent through to some more distant point.

This is true in the case of the Union Pacific, not only from the operating but also from a competitive standpoint. That company can not handle grain into Omaha from the field in competition with lines leading through Omaha unless the grain can move by its line to its final destination with the same convenience that it moves by other lines; and this can only be true when the grain is brought in to the Missouri River and unloaded at that point. The traffic situation, therefore, of the Union Pacific demands that it shall encourage a system of handling this grain which involves the unloading of the grain both by itself and its competitors at the Missouri River.

The same thing is true, viewed as an outgoing proposition, from the standpoint of a railway, like the Chicago Great Western, whose western terminus is at Omaha. Grain brought to Omaha goes almost entirely to some point of consumption east. If the Chicago Great Western is to obtain a part of this competitive business it must do so by taking it from the elevators at Omaha. It can not be expected that these through lines, operating both east and west of the Missouri River, will bring the traffic to Omaha and there deliver it to the Great Western. Competitive conditions, therefore, imperatively require the Chicago Great Western to promote such traffic and commercial conditions as will enable it to secure a portion of this business; in other words, it must bring it about that this grain is elevated and reloaded at the Missouri River.

The purpose of the Union Pacific is not served by reducing the rate into Omaha, for that is met by every other line; nor is the purpose of the Great Western accomplished by making a lower rate from Omaha, which must be made by all lines. What these companies desire is the unloading and reloading of this grain at Omaha, and this can only be accomplished by promoting in some way the building and operation of elevators at that point.

Now, it seemed to the writer that the Union Pacific in the just conservation of its interests, that the Chicago Great Western in the legitimate development of its business, might make this elevation allowance at Omaha, and therefore that the discrimination caused by the payment of this allowance ought not to be pronounced undue.

There was still another consideration of some weight. About the only competition between carriers in the transportation of grain had arisen in respect of these elevation allowances. The payment of such allowances amounts to a reduction in the rate which must finally inure to the benefit of the producer and the consumer. To cut out this allowance and all similar allowances and privileges would be to increase in effect by a very large sum in the aggregate the transportation charges of this country, and we might well hesitate to do this unless it were found absolutely necessary.

In the light of what has transpired since our decision, and as a result of that decision, and in view of what must inevitably happen if we adhere to it and apply it, we are constrained to now hold that this elevation allowance is an undue discrimination which should be prohibited.

It long since became clear that the public had nothing to gain in the way of transportation charges from our recognition of the propriety of these payments. Soon after the submission of the Peavey case the last time, carriers operating from the Missouri River, becoming convinced that the Commission would sustain the legality of the Peavey contract, and realizing that they must therefore establish similar allowances, advanced their rates 1¼ cents per 100 pounds upon the theory apparently that the elevation allowance would equal that amount. When the Commission published its opinion allowing ¾ of 1 cent per 100 pounds, the carriers promptly put in elevation to that extent. The net result to the public was therefore a loss of ½ cent per 100 pounds, and the shipper is still poorer by that amount.

It has also become perfectly apparent that whatever may have been true when the Peavey contract was entered into, or when the original hearing in that case was had, or even at the time of the second report, this payment is no longer in any sense intended to cover the expense of a transfer. It is an elevator allowance, pure and simple, made to the owner

of the grain if he elevates that grain upon the Missouri River, and for the purpose of persuading him to elevate it at that point. While paid nominally to the elevator, it turned out in testimony in the present case that practically without exception the operator of the elevator into which the grain was unloaded was the owner of the grain itself. If a case should arise where the owner of the grain was not also operator of the elevator, he might still, if he required this elevator service, obtain it for nothing, since the elevator would give him the service upon receiving from the railroad company the ¾ of 1 cent.

The traffic representatives of these defendants all testified that they paid this sum, not as a transfer charge, not because they had occasion to use a transfer, but because they were compelled by competitive conditions.

This is now regarded by the shipper as an elevator allowance. It is paid by the railway as an elevator allowance, and we must regard, when disposing of this question, not the circumstances under which the practice may have originated, but the facts as they now exist. What does not seem to have been clearly apprehended in the former discussions of this subject is the importance of this allowance, the extent to which it would be felt, and the impossibility of controlling it in any other way than by prohibiting entirely such payments. Nothing can more clearly show this than the cases which are now pending before this Commission.

Take the facts disclosed by the present record. For years these defendant carriers have maintained a certain relation in rates from the fields of production west of the Missouri River to Kansas City and St. Louis. The rate from the field to St. Louis has been the local to the Missouri River plus the local from the Missouri River to St. Louis. Under this adjustment of rates it has been possible to move grain through either the markets at the Missouri River or St. Louis to eastern destinations upon the same terms as to cost of transportation. To-day this relation has been altered. Grain can be moved to eastern points for ¾ of 1 cent per 100 pounds less through Kansas City than through St. Louis. This is plainly unjust and should be corrected. Why not remove this discrimination by commanding the defendants to make the same allowance at St. Louis as at Kansas City?

At the present time grain destined for certain parts of Texas and for certain portions of the South receives at St. Louis an elevation allowance of ¾ of 1 cent per 100 pounds. By tariff becoming effective since the hearing, lines leading east from St. Louis now allow an elevation fee of ¼ of 1 cent per bushel on outbound shipments. If, therefore, these defendants are required to pay ¾ of 1 cent allowance at St. Louis, that market will thereby acquire an advantage over the Missouri River. Could we, in order to avoid this result, say that the defendants need not pay an allowance at St. Louis so long as lines leading out did so, or that the allowance made by them at St. Louis should not be the same as that paid upon the Missouri River, but only sufficient to equalize conditions at these two markets? Could we hold that so long as the Baltimore & Ohio granted the allowance from St. Louis the Missouri Pacific need not apply it to inbound shipments; but that should the Baltimore & Ohio at any time withdraw its tariff upon the outbound shipment then the Missouri Pacific must apply its allowance upon the inbound?

Consider the mill located at B, in Illinois, to which the shipment from A, in our original illustration, was supposed to be made. Assume that the miller, instead of buying his grain from the elevator at St. Louis or at Omaha, elects to go into the field and purchase from the farmer. Is there any reason why this shipper should pay more for a less service than the grain dealer at Omaha, simply because the miller does not require and can not use elevation at that market?

Consider the mill located at Omaha itself. What imaginable reason is there why grain should be taken to an elevator in Omaha and unloaded at ¾ of 1 cent per 100 pounds less than it will be taken to the mill and unloaded, when every physical incident of the two transactions is the same.

The effect of these allowances upon the milling industry is more clearly seen by reference to the mills located west of the Missouri River. There are, for example, large milling interests in southern Kansas, and these mills buy directly from the field. In the past they have competed with mills east of the Missouri River which have bought their grain through elevators located at those markets. To-day all these mills to the east of that river enjoy the benefit of free eleva-

tion, or of an elevation allowance which is equivalent to free elevation, and which is ¾ of 1 cent per 100 pounds. As compared with a year ago these mills to the east of the Missouri River have acquired an advantage in the purchase of their raw material over the Kansas mills, which buy directly from the producer, of ¾ of 1 cent per 100 pounds.

The Commission now has before it a complaint from a company operating a terminal elevator some 40 miles west of the Missouri River. This company sells grain which passes through this elevator in competition with grain elevated at the Missouri River. The evidence clearly shows that without this allowance this concern must go out of business at that point. This allowance must extend, therefore, not only to the east but to the west.

It is said that we ought not to prohibit the payment of these allowances for the reason that we can not prevent the granting of free elevation, and that to prohibit the allowance by railways not owning elevators while their competitors who do operate elevators can grant to their shippers free elevation would be unjust. If it be true in fact that that free elevation can not be prevented, we should certainly hesitate to attempt to prohibit the payment of the allowance. If the Great Western Railway, owning as it does an elevator at Omaha, can give free elevation, every other line must also construct and own an elevator at this point. The business of elevation would be entirely done by railroad elevators, and every private establishment of that kind would be virtually confiscated.

But we do not by any means concede that free elevation can not be prohibited. Upon the contrary, there is no difference in principle between the giving of the service and the giving of the money with which to buy the service, and we have no doubt that this Commission has the same jurisdiction to prohibit the granting of the free service which it has to prohibit the payment of the allowance.

It is without doubt the right of the Union Pacific Company to provide at Omaha storage facilities into which its cars can be unloaded and thereby promptly released. That company may without question provide for the transfer of grain from its own cars to the cars of its connection when that is necessary to complete a through shipment. It can provide these facilities either by an outlay upon its own part or by con-

tracting for the performance of the service at so much per bushel. This service pertains entirely to the transportation of the grain. The shipper has no possible interest in it, and it is entirely immaterial to him by what means that is effected, provided the service of transportation be properly performed.

If, however, the Union Pacific Company gives to the shipper over its line the privilege of securing for nothing an official weight and inspection of his carload of grain; if it issues to him a certificate by which it agrees to hold a certain amount of grain of a certain grade at the pleasure of the shipper and send that grain forward to whatever destination the shipper names, an entirely new element is introduced into the transaction. This is not an incident of transportation, nor is it performed for the benefit of the carrier. It is a part of the grain dealer's business, is for his benefit, and is of value to him. If it is accorded to one dealer and not to another, a preference in favor of the dealer who receives it arises. This service the railroad company has no right to render free when this works an undue discrimination against other shippers.

It is true that this service costs the railroad company but little and is of much greater value to the shipper who receives it. This goes to the convenience and not to the quality of the transaction. It may be in the interest of economy that the carrier should render this service for the shipper. We do not now hold that commercial elevation may not properly be furnished by a railroad, but we do hold that such elevation must be charged for at what it is reasonably worth.

We hold that a railroad company by extending a privilege of value to one member of the shipping public, when that privilege in the nature of things is not desired and can not be used by other members of the public, is thereby guilty of a discrimination in favor of the one who can and does use the privilege. This discrimination may or may not be undue, according to the circumstances of each case. In the great majority of instances such discriminations are not in fact unlawful. But upon the facts now before us the granting of free commercial elevation or the payment of an elevation allowance must be held an undue discrimination and therefore unlawful. Such an allowance by the Union Pacific at Omaha is not open to the whole public, but only to those

members of the public who have occasion to use an elevator at Omaha.

The defendants in this case will be ordered to cease and desist from such payments at Kansas City and other Missouri River points. In order that sufficient time may be allowed to prevent any disturbance of business conditions this order will not take effect until October 1, and the tariffs of the defendants withdrawing the allowance must be filed upon thirty days' notice.

HARLAN, *Commissioner*, concurring:

I concur in the disposition made by the Commission of these complaints but not in all the inferences that may be drawn from what is said in the opinion. I am not willing to be understood as entertaining the view that a railroad company may not exercise its own discretion in providing necessary facilities for the conduct of its transportation and the management of its terminals and equipment; and may not for that purpose provide elevation for its grain shipments free of charge. As that term is used in the act I understand it to mean substantially a transfer of the grain from the car of the inbound carrier through an elevator to the car of the outbound carrier within a period of ten days. And in such elevation I see nothing either preferential or discriminatory whether done in an elevator operated by the carrier or in an elevator operated for it by the owner. But I agree that any allowance by the carrier to the owner of an elevator on grain belonging to him that has been weighed, inspected, cleaned, mixed, or otherwise treated in the process of elevation is unlawful. As a facility for the convenience of the carrier free elevation is unobjectionable; but when the owner is permitted to and does use the elevation as a transit privilege for himself by means of which to secure commercial advantages on his own grain, the result is an unlawful preference and discrimination. This is expressly so stated in the proceeding entitled *In the Matter of Allowances to Elevators by the Union Pacific R. R Co., ante*, p. 315, and, in substance, in the opinion of the Commission in the same case reported in 12 I. C. C. Rep., at p. 85.

I am requested by Commissioner Clark to say that he concurs in this view.

ORDER.

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 29th day of June, A. D. 1908.

Present:

MARTIN A. KNAPP,
JUDSON C. CLEMENTS,
CHARLES A. PROUTY,
FRANCIS M. COCKRELL,
FRANKLIN K. LANE,
EDGAR E. CLARK,
JAMES S. HARLAN,
} Commissioners.

No. 1239.

TRAFFIC BUREAU, MERCHANTS' EXCHANGE OF ST. LOUIS,

v.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY.

No. 1240.

SAME

v.

MISSOURI PACIFIC RAILWAY COMPANY.

No. 1241.

SAME

v.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY.

No. 1263.

SAME

v.

ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY.

No. 1267.

SAME

v.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY.

These cases being at issue upon complaints and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a report containing its conclusions thereon:

It is ordered, That the defendants, the Chicago, Burlington & Quincy Railroad Company, the Missouri Pacific Railway Company, the Chicago, Rock Island & Pacific Railway Company, the St. Louis & San Francisco Railroad Company, and the Missouri, Kansas & Texas Railway Company, be, and they severally are hereby, notified and required to cease and desist, on or before the first day of October, 1908, and for a period of at least two years thereafter abstain from giving or paying ¾ of 1 cent per 100 pounds or any other sum as an allowance or compensation for service rendered in the elevation of grain at Kansas City, Mo., and other Missouri River points on their respective lines, or points or places in territory adjacent thereto. Tariffs withdrawing said allowance may be made effective upon thirty days' notice to the public and the Interstate Commerce Commission, given in the manner required by law, must contain the notation that they are issued under the authority hereby granted, and must refer to the titles and numbers of these cases.

EXHIBIT No. 6.

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 18th day of August, A. D. 1908.

Present:

MARTIN A. KNAPP,
JUDSON C. CLEMENTS,
CHARLES A. PROUTY,
FRANCIS M. COCKRELL,
FRANKLIN K. LANE,
EDGAR E. CLARK,
JAMES S. HARLAN,
} Commissioners.

No. 1239.

TRAFFIC BUREAU, MERCHANTS' EXCHANGE OF ST. LOUIS

v.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY.

No. 1240.

TRAFFIC BUREAU, MERCHANTS' EXCHANGE OF ST. LOUIS

v.

MISSOURI PACIFIC RAILWAY COMPANY.

No. 1241.

TRAFFIC BUREAU, MERCHANTS' EXCHANGE OF ST. LOUIS

v.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY.

No. 1263.

TRAFFIC BUREAU, MERCHANTS' EXCHANGE OF ST. LOUIS

v.

ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY.

No. 1267.

TRAFFIC BUREAU, MERCHANTS' EXCHANGE OF ST. LOUIS

v.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY.

Upon consideration of the record and the report in the above-entitled cases, and pursuant to application made for that purpose—

It is ordered, That an order dated June 29, 1908, heretofore made by the Commission in the above cases, effective October 1, 1908, be, and the same is hereby, so modified that it shall be effective December 1, 1908, instead of on the said October 1, 1908.

It is further ordered, That a copy of this order be served upon each of the parties to said proceedings.

EXHIBIT No. 7.

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 23d day of October, A. D. 1908.

Present:

MARTIN A. KNAPP,
JUDSON C. CLEMENTS,
CHARLES A. PROUTY,
FRANCIS M. COCKRELL,
FRANKLIN K. LANE,
EDGAR E. CLARK,
JAMES S. HARLAN,
} Commissioners.

No. 1239.

TRAFFIC BUREAU, MERCHANTS' EXCHANGE OF ST. LOUIS

v.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY.

No. 1240.

TRAFFIC BUREAU, MERCHANTS' EXCHANGE OF ST. LOUIS

v.

MISSOURI PACIFIC RAILWAY COMPANY.

No. 1241.

TRAFFIC BUREAU, MERCHANTS' EXCHANGE OF ST. LOUIS

v.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY.

No. 1263.

TRAFFIC BUREAU, MERCHANTS' EXCHANGE OF ST. LOUIS

v.

ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY.

No. 1267.

TRAFFIC BUREAU, MERCHANTS' EXCHANGE OF ST. LOUIS

v.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY.

Upon consideration of the record in the above-entitled cases,

It is ordered: That an order heretofore entered in these cases and by its terms made effective on Ocotber 1, 1908, but afterwards so modified as to become effective December 1, 1908, be, and it is hereby, so further modified as to become effective January 1, 1909, instead of December 1, 1908.

It is further ordered: That a copy of this order be served upon each of the parties to said proceedings.

EXHIBIT NO. 8.

ORDER.

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 25th day of November, A D. 1908.

Present:

MARTIN A. KNAPP,
JUDSON C. CLEMENTS,
CHARLES A. PROUTY,
FRANCIS M. COCKRELL,
FRANKLIN K. LANE,
EDGAR E. CLARK,
JAMES S. HARLAN,
} Commissioners.

No. 1239.

TRAFFIC BUREAU, MERCHANTS' EXCHANGE OF ST. LOUIS,

v.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY.

No. 1240.

TRAFFIC BUREAU, MERCHANTS' EXCHANGE OF ST. LOUIS,

v.

MISSOURI PACIFIC RAILWAY COMPANY.

No. 1241.

TRAFFIC BUREAU, MERCHANTS' EXCHANGE OF ST. LOUIS,

v.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY.

No. 1263.

TRAFFIC BUREAU, MERCHANTS' EXCHANGE OF ST. LOUIS,

v.

ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY.

No. 1267.

TRAFFIC BUREAU, MERCHANTS' EXCHANGE OF ST. LOUIS,

v.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY.

Upon consideration of the record in the above-entitled cases,

It is ordered: That an order heretofore entered in these cases and by its terms made effective on October 1, 1908, but afterwards so modified as to become effective December 1, 1908, and again modified so as to become effective January 1, 1909, be, and it is hereby, so further modified as to become effective July 1, 1909, instead of January 1, 1909.

It is further ordered: That a copy of this order be served upon each of the parties to said proceeding.

EXHIBIT NO. 9.

No. 1239.

TRAFFIC BUREAU, MERCHANTS' EXCHANGE OF ST. LOUIS,

v.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY.

No. 1240.

SAME

v.

MISSOURI PACIFIC RAILWAY COMPANY.

No. 1241.

SAME

v.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY.

No. 1263.

SAME

v.

ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY.

No. 1267.

SAME

v.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY.

BY THE COMMISSION:

Suit has been already begun to vacate the order of the Commission prohibiting payments for elevation under the Peavey contract, and certain grain interests upon the Missouri River desire a judicial determination of the question underlying our order in these cases and are about to institute injunction proceedings. The Commission recognizes the propriety and desirability of securing such judicial determination and is joining in the attempt to bring these suits to a speedy conclusion.

It is evident that if the payment of these allowances were stopped at certain points and to certain persons, while continuing at other points and to other persons, a condition of discrimination and confusion might result which would be much worse than that intended to be corrected by our order in these cases. It has therefore been decided to postpone the effective date of that order until July 1, 1909, and to recommend to carriers generally that any action contemplated in view of that order be deferred to the same date. It is believed that if all parties cooperate the opinion of the Supreme Court of the United States can be obtained within that time.

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114 Afterwards, to wit, on the 20th day of November, 1909, a stipulation was filed. Said stipulation is in words and figures as follows:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

HARRY J. DIFFENBAUGH ET AL., COMPLAINANTS,
v.
INTERSTATE COMMERCE COMMISSION, DEFENDANT.
} In Equity. No. 3437.

STIPULATION.

It is agreed that this case may be tried upon the following evidence:

First. The evidence heretofore taken in the proceedings before the Interstate Commerce Commission referred to in the bill of complaint and answer in this case, and in case No. 3405, an abstract of which is attached to the stipulation signed by counsel for the parties, and marked "Exhibit 1" in case 3405. But it is understood that either party may have printed and present to the court the testimony, in part or in full, of any witness or witnesses who testified in said proceedings before said commission.

Second. The orders and opinions of the Interstate Commerce Commission, copies of which will be found in defendant's answer to the bill of complaint in this case.

Third. Subject to the right of either party to show by any tariff to the contrary, it is understood that the rates of transportation exacted and collected by the railroad companies for the transportation of grain from points of origin west of the Missouri River to points on that river are the same in each instance, whether the final destination of the grain is some point on the river or some point east thereof. That is to say, where no elevation allowance is paid the total charge for transportation paid by the shipper is the same as where an elevation allowance is paid.

Fourth. It is admitted that H. G. Wilson would, if present, testify as follows, and his statement shall be taken with the same force and effect as if he had been called as a witness and so testified:

115 1. I am a commissioner of the Kansas City Transportation Bureau, representing the manufacturing, jobbing, grain, hay, and live-stock interests of Kansas City in their relations with railroads and railroad rates; have held that position for two years, prior to which was traffic manager of the Kansas City Board of Trade, and prior to that with the St. Louis & San Francisco and Kansas City, Fort Scott & Memphis railroads in various capacities, from clerk to general freight agent. I am intimately connected with conditions along the Missouri River.

2. For the year 1907 the total volume of grain business handled in and out of Missouri grain markets was as follows:

	Bushels of grain handled.	Valued at—
Kansas City, Mo.	111,033,450	$70,739,930
Omaha, Nebr.	85,195,200	49,104,344
St. Joseph, Mo.	6,500,000	9,000,000
Atchison, Kans.	7,000,000	5,000,000
Total	209,728,650	133,844,274

All of the cities above named are general and important grain markets, at which large numbers of persons are directly and financially interested in carrying on a general grain business. Many of them are commission men who buy and sell grain on commission; others have erected, and now operate, large flouring mills; while still others have erected or leased, and now operate, large elevators for the storing, transferring, and weighing of grain. All of the persons interested in these various lines of business have invested money in their properties. The members of the boards of trade and grain exchanges mentioned in the bill have invested large sums of money in building up and maintaining their respective lines of business, and those of them who are in the elevator business have spent large sums in providing elevators and elevator facilities, and an abstract is hereto attached showing the amount of the investments in elevators as of the dates therein designated.

116 3. Of the grain handled at Missouri River cities not more than 10 per cent is consumed, which finds its final market at said Missouri River cities; the balance, or about 90 per cent thereof, is purchased by the members of the said boards of trade and exchanges, shipped to them at Missouri River cities where it is treated, cleaned, mixed, clipped, weighed, and possibly stored for a time, and then transported to other markets east, north, or south, or to foreign countries.

4. All published tariffs provide for rates on grain on a basis of so much per 100 pounds, and to ascertain the total charges on a carload of grain it has always been necessary to provide reasonable facilities for securing the correct weight thereof. These weighing facilities for grain were first provided by railroads installing track scales upon which loaded cars were switched and weighed. For various reasons this method was unsatisfactory and abandoned at market cities. There was adopted the plan of securing said weights by means of scales in grain elevators under the supervision of official weighers, whose certificates are generally accepted by railroads, shippers, and the public. The practice so continued until now it has become a universal system and custom at all market places and an essential part of the method of handling and transporting grain, the abandonment of which would demoralize trade, render contracts uncertain, and greatly increase the cost of handling all kinds of

grain and give far less satisfaction to the carriers than the methods formerly adopted.

5. The use of the modern elevator in the great market places has become necessary to the railroads, and in the past recent years the railroads have encouraged their building, maintenance, and operation at all Missouri River markets.

GEORGE T. BELL,
FRANK HAGERMAN,
JOHN BARTON PAYNE,
Solicitors for Complainants.
ARBA S. VAN VALKENBURGH,
P. J. FARRELL,
Solicitors for Defendant.

117 Afterwards, to wit, on the 26th day of November, 1909, a replication was filed. Said replication is in words and figures as follows:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

HARRY J. DIFFENBAUGH ET AL., COMPLAINANTS,
vs.
INTERSTATE COMMERCE COMMISSION, DEFENDANT. } No. 3437.

REPLICATION.

These complainants as replicants, saving and reserving to themselves all and all manner of advantages of exception which may be had and taken to the manifold errors, uncertainties and insufficiencies of the answer of the defendant, Interstate Commerce Commission, for replication thereunto saith that they doth and will aver, maintain, and prove their said bill to be true, certain, and sufficient in the law to be answered unto by the said defendant, and that the answer of the said defendant is very uncertain, evasive, and insufficient in law to be replied unto by these replicants; without that, that any other matter or thing in the said answer contained, material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is true; all which matters and things these replicants are ready to aver, maintain, and prove as this honorable court shall direct and humbly pray as in and by their said bill they have already prayed.

GEORGE T. BELL,
JOHN BARTON PAYNE,
FRANK HAGERMAN,
Solicitors for Complainants.

118 Afterwards, to wit, on the 3rd day of December, 1909, a stipulation was filed. Said stipulation is in words and figures as follows:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

F. H. PEAVEY & COMPANY ET AL., complainants, *v.* UNION PACIFIC RAILROAD COMPANY et al., defendants.	In Equity. No. 3405.

STIPULATION.

It is hereby agreed that the above-entitled cause may be tried upon the following evidence:

1. The evidence heretofore taken in the proceedings before the Interstate Commerce Commission referred to in the bill of complaint and answer in this case and in case No. 3437, an abstract of which is herewith submitted signed by counsel for the parties, and marked "Exhibit 1." But it is understood that either party may have printed and present to the court the testimony, in part or in full, of any witness or witnesses who testified in said proceedings before said commission.

2. A copy of the written contract for the construction of the Council Bluffs elevator which was entered into by and between Frank H. Peavey and the Union Pacific Railroad Company, the same being attached hereto and marked "Exhibit 2."

3. The orders and opinions of the Interstate Commerce Commission, copies of which will be found in defendant's answer to the bill of complaint in case No. 3437.

4. The following statement of Frank T. Heffelfinger, it being agreed that he would, if recalled, testify as follows: When the order of June 29, 1908, was entered, complainants demanded of the Union Pacific that it carry out and comply with its contract and bring a suit to annul and set aside the order of the commission. This it declined to do, but finally agreed, with the consent of the commission, to, and did, amend its published tariff and schedule so far as to provide for its continuation for time being, but to prohibit any payment
119 being made thereunder unless and until a court should determine there was a liability, but did not agree to continue the publication for any definite time. The commission consented to the filing of this amendment provided it could have an opportunity to be heard in any proceeding to question its orders. Since the 1st of May, 1908, and since the promulgation and taking effect of the order aforesaid of June 29, 1908, and up to the 1st day of October, 1908, the Omaha and Midland companies have performed for the Union Pacific the elevation and transfer services aforesaid to the extent and

in the amounts set forth in the itemized accounts attached to the bill as Exhibits 6 and 7. Demand was made of the Union Pacific for the payment of said bills, but payment was refused. Like bills have since been daily and constantly accruing, but have not been paid.

5. Subject to the right of either party to show any tariff to the contrary, it is understood that the rates of transportation exacted and collected by the Union Pacific Railroad Company for the transportation of grain from points of origin west of the Missouri River to points on that river are the same in each instance, whether the final destination of the grain is some point on the river or some point east thereof—that is to say, where no elevation allowance is paid the total charge for transportation paid by the shipper is the same as where an elevation allowance is paid.

M. B. KOON,
FRANK HAGERMAN,
Solicitors for Complainants.
F. C. DILLARD,
Solicitor for Union Pacific Railroad Company.
ARBA S. VAN VALKENBURGH,
P. J. FARRELL,
Solicitors for Interstate Commerce Commission.

120

EXHIBIT I, PART I.

ABSTRACT OF TESTIMONY BEFORE THE INTERSTATE COMMERCE COMMISSION IN THE MATTER OF ALLOWANCES TO ELEVATORS BY THE UNION PACIFIC RAILROAD COMPANY.

[Hearings at Chicago, Ill., on June 25, 26, and 27, 1903, September 17 and 18, 1906, and October 1, 2, 3, 4, and 5, 1906.]

INDEX TO WITNESSES.

	Original.	Print.
Biddle, W. B.	127	162
Brodnax, T. J.	162	210
Chase, Guy	160	207
Crosby, G. H.	130, 144	167, 186
Davis, C. F.	150	194
Gillett, L. S.	143	185
Gower, H.	129, 160, 168	165, 208, 219
Heffelfinger, F. T	124, 131, 134, 170	158, 168, 173, 222
Ives, D. O.	172	224
Jaquith, A. B.	139	179
Kelley, John	159	206
Leflang, B. M. F.	149	193
Lincoln, J. C.	152	197
McMurray, S.	156	202
McVann, E. J.	162	210
Merriam, N.	169	220
Miller, D.	132	170
Moffatt, E. O.	158	204
Munroe, J. A.	121, 164	154, 213
Peck, E. P.	134, 137	172, 176
Pettit, James	169	220
Powell, Geo. F.	148	191
Rankin, W. T.	172	224

	Original.	Print.
Rupley, Geo	144	186
Seaver, James E	133	171
Sowle, L. T	143	185
Spens, C. E	145	187
Stith, W. C	128	164
Stohr, P. C	126	161
Stream, John J	155	200
Suffern, Wm. H	152	196
Thompson, Geo. C	150	194
Tucker, J. F	130	166
Warren, Wm. S	157	204
Winther, P. K	157	204

121 Testimony Before the Interstate Commerce Commission, Vol. I, June 25, 1903.

J. A. MUNROE, freight traffic manager, Union Pacific, connected with traffic department for twenty years:

The Union Pacific system serves the States of Kansas, Nebraska, Colorado, Wyoming, and Utah. The eastern termini are Council Bluffs and Kansas City, Mo. In Kansas competitors are the Atchison, Topeka & Santa Fe; Chicago, Rock Island & Pacific; Missouri Pacific, and Chicago, Burlington & Quincy, and Frisco and Missouri, Kansas & Texas to a limited extent. In Nebraska the competitors are the Burlington, Rock Island, and the Nebraska division of Chicago & Northwestern, and to a limited extent the Chicago, St. Paul, Minneapolis & Omaha and also St. Joseph & Grand Island. The North Western, Burlington, and Rock Island go through Omaha and Council Bluffs to Chicago, having through lines from the West. Santa Fe and Rock Island go through Kansas City to Chicago. Union Pacific is the only line serving Kansas not having eastern lines.

Peavey & Company operate grain business in Minnesota, North Dakota, South Dakota, Nebraska, Kansas, and Wisconsin. The contract with Peavey & Company for elevation was made in 1899, exclusively and primarily as a bona fide relief in the question of cars. Union Pacific has limited equipment for through traffic. Equipment consists of about 8,000 box cars, and grain must be loaded in box cars. Union Pacific has had bitter experience in the past allowing their equipment to go to eastern destinations without transfer. Must have ample elevator facilities at eastern terminals of Union Pacific in order to get fair use of equipment and regularly serve patrons. Therefore, Union Pacific called upon Mr. Peavey looking to the putting up at Council Bluffs of an elevator of not less than 1,500,000 bushels capacity. Had some experience with shovel transfer and elevated tracks, but demonstrated no modern facility known to take place of elevator. Services were worth all the Union Pacific had to pay for them, viz, 1¼ cents per hundredweight, and have resulted in far better use of equipment. Contract has never had any effect on the grain producers in the interior, nor has there been higher prices paid to the grower by reason of the contract; nor has it ever given Peavey &

Company any undue advantage over any shipper or any other party in the information of the witness, and he has never heard any complaint from anyone doing business along the lines of the Union Pacific that the contract was prejudicial. Has given foregoing matters most careful attention. The Union Pacific has announced that it was ready to allow the same transfer charge to any corporation or individual who will erect a modern elevator of the same size as the Peavey elevator either at Council Bluffs or Kansas City. The size of the elevator at Council Bluffs is 1,500,000 bushels and at Kansas City 1,000,000 bushels.

The elevator was built at the instance of the Union Pacific. "We sought Peavey; he did not seek us."

Grain produced in Kansas and Nebraska is marketed mostly in the East, and through rates obtain from Kansas and Nebraska points to the East. The effect of the elevators is to permit the unloading of the grain transported by the Union Pacific, the storing for such time as commercial conditions may demand, and the reshipment of the grain to the Mississippi River and East, the same through rate being protected from points of origin as would obtain had this grain moved without transfer. But for the elevators the cars of the Union Pacific would, during the three or four months in which this commodity is transported, all move into foreign territory, and it would result in a car famine on the lines of the Union Pacific. There is another elevator at Council Bluffs, known as Trans-Mississippi Company, the ownership of which is in the Union Ele-
122 vator Company, which is composed of six equal parts among six lines running from Council Bluffs east, including the Union Pacific running west. This elevator is operated by the Trans-Mississippi Grain Company, and the same rates apply as with the Peavey elevator. Although there is no regular written contract with the Midland Elevator Company at Kansas City, there is an understanding or implied contract for the same charge and arrangement as at Council Bluffs. The Midland elevator at Kansas City is owned by the Peavey interests.

The competitors of the Union Pacific having rails east of Council Bluffs and Kansas City, and naturally wishing to have the longest haul possible for their own road, haul their grain to their terminals which are farthest, while the Union Pacific, whose lines terminate at Council Bluffs and Kansas City, not wishing to allow their cars to go east, transfer their grain at those points, and it is absolutely necessary to have elevators for this transfer. Grain facilities are absolutely necessary for conduct of a large grain business at a large grain center. Elevator facilities are absolutely necessary for the proper handling by the Union Pacific of any large volume of grain. The Union Pacific has had experience in owning elevator, but finds it most satisfactory to hire the elevation. The shovel transfer is absolutely impracticable, and the elevator transfer is the best method known. The charge of 1¼ cents per hundredweight is, in the opinion of the witness, reasonable compensation for the services rendered. The Union

Pacific is the only line that permits the protection of the through rate through elevators on grain from the west, and therefore the elevator at Council Bluffs would handle only the grain of the Union Pacific.

The Chicago Great Western on the north handle their grain by way of Blair, Nebr., the Burlington on the south by way of Plattsmouth, and the Rock Island direct. The grain in the Peavey elevators at Council Bluffs goes east by the Burlington, Rock Island, North-Western, the St. Paul, and the Illinois Central. When the grain is delivered to the Peavey elevator it passes out of the hands of the Union Pacific and the transaction as far as that road is concerned is practically closed. Eastern roads who are parties to the tariffs of the Union Pacific take the grain from the elevator for transportation east. The charge is exclusively paid by the Union Pacific as a car-release question. The contract with Peavey & Company allows the railroad forty-eight hours free storage. It is absolutely necessary for the economical and reasonable handling of the grain business of the Union Pacific to have a grain elevator at Council Bluffs. If it did not build it would have to have some one else to do so.

Peavey & Company own practically all the grain that goes through their elevator. They operate some 70 houses on the Union Pacific in Nebraska and 50 in Kansas. They buy the grain in the interior and ship it. Peavey & Company do not own all the grain that passes over the Union Pacific. Grain is consigned through from the initial point. It is billed in at the Union Pacific's local rate and the Union Pacific collect the local rate when the car is unloaded, or at stated periods. When grain goes out, the Union Pacific's western expense bill is surrendered to the eastern line, where it is verified and stamped. This stamp becomes the authority for the eastern line to accept their proportion of the through rate east of Council Bluffs. The proportion of the through rate which comes to the Union Pacific and the local rate to Council Bluffs are the same. Quite a little of our grain goes through without transfer.

Has been no occasion for Union Pacific to use storage beyond the forty-eight hours. We have utilized foreign cars homeward bound in connection with other business so far to bring about the relief. The independent buyers must have a car that goes through without transfer at Council Bluffs, and a reasonable amount of cars are furnished them, a pro rata amount. The elevator can be used by the railroad company for the transfer of grain of the independent buyer if the railroad company so elect, but very little, if any, grain
123 of independent buyers goes through the elevators. There is no elevator charge at Chicago similar to the charge at Council Bluffs. On cars that go through without transfer the Union Pacific pays no elevator charge.

Commissioner CLEMENTS. What proportion of the grain that moves is shipped by independent operators?

Mr. MUNROE. I can not tell you exactly, but I shall be glad to furnish that. I would say perhaps it varies from 30 to 40 per cent. Most of the grain is handled by the elevators by reason of the large number of houses they have in the interior. On grain of independent shippers if a through car could not be furnished and the grain had to be transferred at Council Bluffs or Kansas City, the Union Pacific would bear the expense of the transfer, so the independent shipper has the benefit of exactly the same through rate as Peavey. The shipper specifies the routing; if he calls for Wabash equipment, the Union Pacific gets that if possible. No allowance is paid by Union Pacific anywhere on its lines, except Council Bluffs and Kansas City. Independent shippers have elevators at Kansas City.

Complaints come from grain men operating on other lines, who demand from other roads what they call terms as good as Peavey receives from the Union Pacific, overlooking the fact that the Union Pacific has to purchase transfer facilities.

The grain of Peavey & Company is elevated at Kansas City at the Midland elevator, other grain at other elevators. The Union Pacific pays for the elevation at the Midland, but does not at the other elevators.

The Santa Fe brings grain to Chicago which goes east on other roads and when that grain is transferred the eastern roads are making transfer allowances to certain houses other than the regular houses, known as transfer houses, so there is no expense so far as the shipper and consignee are concerned.

The shovel method of transfer is used to some extent on the grain of independent shippers. Sometimes the Union Pacific allows its equipment to go east with grain shipments. All the grain that is elevated in the Union elevator at Council Bluffs goes to the roads operating lines east, and the routing is specified by the shippers. Each road gets a certain portion. For a certain period one carrier will get more than another. All lines east of Council Bluffs have access to the Peavey elevator. It is believed that the grain dealers on the Santa Fe get as high prices for their grain as the dealers on the Union Pacific. Peavey & Company does not pay any more for grain than anyone else. There are several competitors of Peavey and the Trans-Mississippi company. There are more houses in the interior belonging to other dealers than there are belonging to Peavey & Company.

The minimum cost of transfer by shovel is $1.75 per car, but the maximum cost, taking into consideration delay to equipment, would be $25 to $100. Given the tracks, the requisite number of men, and the cars, the shovel transfer would cost somewhat less than for the elevator transfer.

No allowance is made at milling in transit points for unloading cars and releasing equipment. Although there are other elevators at Kansas City in which grain is unloaded, no allowance is made by the Union Pacific to such elevators. The rate of the Union Pacific takes the grain into the Peavey house and returns the empty.

The modern elevator returns the empties in shortest possible time. In shovel transfer it is necessary to have doors of unloading and receiving cars exactly opposite. Have therefore to assign a special switch engine and crew. Have maximum of switching service with minimum result. When grain is moving, in the track or high-ball transfer, have to rely on connecting line's car being ready. Do not with the elevator transfer.

At Chicago there are cases where one-fourth of a cent per bushel is paid. "On this independent grain, if we can bring about an economical measure and use shovel transfer, we do it at our expense.

We make the best trade we can of the individual cars before us
124 to-day." Have been enabled to either ship through or transfer independent grain without using the elevator of Peavey & Company. Forty-eight hours' storage does not apply on Peavey & Company grain; that can remain as long as they choose.

Wheat moves from between the middle of July and the 1st of August and continues into the fall. Corn commences to move in December and continues until May or June.

Mr. F. T. HEFFELFINGER, Minneapolis, member of the firm of F. H. Peavey & Company, who are grain merchants and owners of elevator interests, which are distributed largely over the States of the Mississippi Valley:

Have elevators at Duluth, Chicago, Minneapolis, Council Bluffs, and Kansas City, and about 450 country stations in the States of North Dakota, South Dakota, Minnesota, Iowa, Nebraska, and Kansas. The Union Pacific desired facilities at Council Bluffs and Mr. Peavey was asked to put up the elevator, which was constructed in the spring of 1899. The elevator was transferred to the Omaha Elevator Company, and since its completion has been operated by that company. A controlling interest in the stock of that company is owned by Peavey & Company. The elevator at Kansas City is operated by the Midland Elevator Company, and a controlling interest in the stock is owned by Peavey & Company. Elevators have been more or less under the personal supervision of witness. From the standpoint of the railroad company and as incidental to the grain business, considers 1¼ cents per 100 pounds a fair allowance. There is no charge paid by other roads hauling the grain out of the elevators.

The following tables contain a statement of the cost of operation of the elevators at Kansas City and Council Bluffs, together with a statement of the bushels of grain handled:

Total bushels grain handled by Union Pacific elevator for Union Pacific Railway for five years.

July, 1898, to June, 1899	1,523,956
July, 1899, to June, 1900	2,333,251
July, 1900, to June, 1901	4,673,850
July, 1901, to June, 1902	2,677,883
July, 1902, to May, 1903	1,120,441
Total	12,329,381

Total transfer charge paid to elevator, July, 1898, to May, 1903		$92,069.63
General elevator expense	$45,343.00	
Taxes	4,918.00	
Building insurance	10,182.00	
Maintenance, repairs	17,047.00	
		77,500.00
Gain, five years		14,569.63
Average annual gain		2,913.92
Cost of elevator		150,000.00

NOTE.—No charge is made against elevator in above figures for insurance on grain in store awaiting shipment, interest on money invested in such grain, clerical work in office, general management or depreciation in value of plant, or interest on money invested in plant.

Total bushels grain handled by Peavey elevator, Council Bluffs, for four years.

July, 1899, to June, 1900	8,695,594
July, 1900, to June, 1901	5,991,712
July, 1901, to June, 1902	2,953,776
July, 1902, to May, 1903	6,198,451
Total	23,839,533

Total transfer charge paid to elevator, July, 1899, to June, 1903		$157,639.96
General elevator expense	$79,708.00	
Taxes	9,960.30	
Building insurance	14,800.00	
Maintenance, repairs	6,000.00	
		110,468.30
Profit		47,171.66
Average annual profit		11,792.91
Cost of elevator		200,000.00

NOTE.—No charge is made against elevator in above figures for insurance on grain in store awaiting shipment, interest on money invested in such grain, clerical work in office or general management, or depreciation in value of plant, or interest on money invested in plant.

125 The grain going into the elevator is owned by the Omaha Elevator Company. No other grain than that from the Union Pacific was handled through the elevator at Council Bluffs. Nothing was received for storage. About 60 per cent of the grain was corn, on which the allowance is 7 mills per bushel; 14 per cent oats, on which 4 mills was paid; 17 or 18 per cent wheat, on which the allowance was three-fourths of a cent, and the balance barley, on which six-tenths of a cent was paid.

About 3,000,000 bushels were handled at Kansas City, which is not included in the statement. The expense for handling that grain is deducted from the total expense in proportion to the amount handled, which is about sixty-three one-hundredths of a cent per bushel. The expense of running the elevator is in one account. Any profit accruing from the handling of grain—that is, an advantage in storing, mixing, and treating the grain—goes into the grain account. This profit can not be estimated. It would have been unprofitable to run a transfer elevator unless there was some profit accruing from grain business.

At the end of the fiscal year the elevator is practically cleaned out, while at other times in the fall it is filled and overflowing. No

charge was made to the grain business by the elevator business for storage, etc. There is no other place where the railroad company pays an allowance for transferring grain; there is no place where the same conditions exist. There would be a storage charge for storing grain of anybody else, other than the forty-eight hours provided for in the contract on grain transferred for the Union Pacific. There is no storage of grain at Council Bluffs. The charge for storage at Kansas City is three-eighths of a cent for twenty days and three-fourths for thirty days per busel. "It is our endeavor—being a transfer point and not a grain market—to obtain cars as fast as we can and to ship the grain out." Very little grain is shipped direct to New Orleans, New York, or Baltimore. Most of it goes to Chicago, some to St. Louis, Kansas City, Baltimore, and Minneapolis. If the grain went to an elevator company in Chicago and St. Louis it would be elevated again. Peavey & Company sell very largely to other grain dealers at other grain markets.

The CHAIRMAN. Could you conduct your present business on the line of the Union Pacific road without an elevator at Council Bluffs?

Mr. HEFFELFINGER. Absolutely. They could ship the grain through to Chicago and have their facilities there. The elevator was built as an investment, and Peavey & Company are satisfied that it pays. If they were not grain men they absolutely could not afford to build and maintain the elevator as a mere transfer proposition. Understands there are some 900 elevators in Nebraska and Peavey & Company have only 72. If they did not have the elevator at Council Bluffs the same aggregate amount of grain would be handled through the country houses and profits would be in the aggregate as large if not larger on the country end than they are now on the whole. The company, however, gets a large amount of storage at Council Bluffs, which in part remunerates them for the construction of the elevator. Are times when storage itself caused them actual loss; if could have shipped through it would have saved them money—insurance and tying up causes loss. As soon as the grain is mature it begins to move and is marketed in large quantities, which is usually a period when other merchandise is moving and consequently there are sometimes not enough cars to ship the grain. Storage in Omaha is not indispensable, as the company could build elevators in the country as they are doing.

"It would probably not cost us over 4 or 5 cents a bushel for the storage. We could do it there if we found it advisable. Naturally, we would not do so, because the grain would be back in the farmers' hands, and we would be very foolish to pile up a lot of grain in the country on which there was an absolute loss. We had better let the farmers carry it. But furnishing this additional storage we are able to handle the farmers' grain now when they want to move it. The farmer gets cash for it; otherwise he would be the loser, because he would have to carry it."

126 The quantity of grain handled through an elevator influences the expense. There are certain fixed charges which must be

paid anyway, and over that is handled cheaper. The largest amount that could be handled through the Omaha elevator is about 18,000,000, and at Kansas City 4,000,000 or 5,000,000. During one year there was a poor crop and no grain was put through the Kansas City elevator and only 294,000 went through the Omaha elevator. There was one time when a cent additional was paid to Peavey & Company, which was a differential against them, other dealers paying a through rate and that company being obliged to pay the sum of the locals. Insurance must be paid on grain in the elevator at Council Bluffs, which, if it was shipped through to Chicago and sold to grain dealers there, would not have to be paid. By storing grain at Council Bluffs instead of shipping to Chicago the company, in some cases, gets the benefit of markets which could not be reached by storage in Chicago. Grain consigned East is transferred free of charge either by the delivering or receiving line in Chicago. The house in Chicago transferring grain from the entire Mississippi Valley fields would have more business and could transfer cheaper than the house at Omaha.

Peavey & Company transfer grain sometimes for customers in Chicago, and in no case would they be able to do it for less than one-half a cent a bushel. Have also transferred some at Minneapolis and Duluth on that basis. There are times when there is a profit in mixing, blending, and storing wheat and reaching other markets than Chicago. It is considered profitable to treat grain in the elevator if it can be improved as much as half a cent. There is very little opportunity to clean, mix, etc., corn and oats. The price to be paid for grain in Kansas and Nebraska is on the basis of the highest market. The grade of corn in markets is determined by inspectors appointed by law or by organizations looking after grain interests.

P. C. STOHR, general traffic manager Chicago Great Western Railway Co.: Has been with the company since 1889:

Chicago Great Western has elevator at Kansas City of about a million bushels capacity and one at St. Joseph of about 100,000 bushels capacity, both operated by the Chicago Great Western. Felt that could transfer grain from western cars to their cars more economically. Also, by having the elevator at Kansas City, have been able to load cars to the maximum capacity. The grain as it is loaded at the country point is shipped in cars of small capacity and the contents was formerly loaded into large cars. Were receiving some grain from elevators of other railroads in Kansas City. It cost from $3 to $5 per car switching charge besides $1.75 per car for transferring grain. Grain, as it comes in from the West, is put in their elevator and then hauled out as cars are available, and no charge is made to the shipper for this transfer. In the last three years has hauled 22,000 cars of grain from the West in 20,000 of Chicago Great Western cars, thus saving 2,000 cars. There does not exist the same reason for the Santa Fe and Burlington to have an elevator as does for the Great Western and Union Pacific.

The lines of the Great Western run north through Leavenworth, Kans., St. Joseph, Mo., and easterly to Chicago. There is also a line to Minneapolis and one almost completed to Omaha.

Cost of transferring grain in these elevators, not including taxes or management, is 1⅛ cents per 100 pounds, including some storage for which a charge is made when it is stored to await a change in the market, but not when the grain is waiting for cars. The amount received from storage was deducted from the gross expense in the statement submitted. To have the services performed by an independent company would be willing to pay 1¼ cents per hundredweight. Interest on the investment was figured at 5 per cent.

In old days used to run the cars upon a track and employ laborers to shovel grain into their cars; found it impossible to double up cars—that is, load two light cars into one large car. Had to set cars door to door and have shifting engine to move up and down the track. The shovel transfer was found impracticable and utterly inadequate.

The elevator is managed as economically as possible.

127 Q. If it costs you 1⅛ cents to do this business, how do you account for the fact that railroad lines in Chicago going east can get that same service performed by elevator companies for one-fourth of a cent per bushel, and in Kansas City, too?—A. That depends on who owns the elevator. If the railroad company owns it and leases it to the elevator man, it is possible that the grain dealer may be getting compensation from some other source.

Grain comes in on the various roads, and if a shipper orders it out via the Great Western it is turned over to the elevator and unloaded. No switching charge is paid by the Great Western in Kansas City. The Santa Fe makes an extra charge for this switching to the shipper, and the Missouri supreme court has held that this charge is proper. The eastern roads pay the transfer charge.

W. B. Biddle, freight traffic manager Atchison, Topeka & Santa Fe Railway Company:

Has been in the freight service of the company about twenty-three years.

Cost of shovel transfer on the Santa Fe varies from $1.40 to $1.75 per car. Did at one time contract with other parties for transfer at $1.25. Is only done where adequate facilities in more desirable form are not available. A very small proportion of the grain that is brought into Kansas City by the Santa Fe goes east over their line to Chicago, because it is put on the market at Kansas City and is open to the competition of all buyers and all roads that reach from Kansas City.

It is as necessary for the Santa Fe to have prompt release of its equipment as it is for the Union Pacific. There are elevators on the line of Santa Fe at Argentine and at other interior points in Kansas which do the same service as those of Peavey & Company at Kansas City. No charge is paid to any of these interior elevators for the performance of similar services. The allowance, if made at Kansas

City, should be made at the interior points, and if the contract of Peavey & Company is permitted to stand the Senta Fe will have to make the allowance to Atchison, Topeka, and Winfield, because they perform the same service.

A small percentage of the grain going over the Santa Fe goes through to Chicago, because most of it is for export and the Gulf ports are the natural outlet. On the Santa Fe, Richardson & Company lease the Santa Fe elevator at Argentine and one interior elevator. Aside from that the business in the country is done by individual buyers. Some of these operate 30 or 40 elevators with no connection with Richardson & Company except to sell them their grain.

The Santa Fe pays for transfer at Argentine from car to car $2 a car of 40,000, 50,000, or 60,000 pounds. If the grain is loaded in a Santa Fe car, it goes through without transfer. Has been told that eastern lines at Chicago allow elevators one-quarter of a cent per 100 pounds for transferring. Cars to the Missouri River contain from 800 to 1,200 bushels; east of the Missouri and Kansas City somewhat less. Santa Fe, Rock Island, Burlington, and Missouri Pacific make no charge at Kansas City for switching when grain which comes in over their lines goes forward over the same line, but make charge when the grain in sent via another line. A large portion of the grain which comes to Kansas City over the Santa Fe goes east over other lines. Most of the grain over the Santa Fe is billed to Kansas City.

Our interest in this matter has been to get at just what the conditions were and what was a reasonable charge to pay for a service which it was admitted we had to have performed. Is an advantage to have equipment released at Kansas City. Has not denied that there was a necessity for the Union Pacific having an elevator at Kansas City.

The contract of the Union Pacific with Peavey & Company only affects the Santa Fe in that the grain dealers who transfer their grain demand the same conditions as are given to Peavey & Company. Has neaver heard of any complaint of difference in prices of grain on Union Pacific.

128 Would be justified in paying anything we had to, whether it was $2 or 1¼ cents per hundredweight, or $5 or $10 per car, to secure prompt release of equipment. No complaint because this charge reflects back into country or that it is illegal, but because if it continues Santa Fe may have to adopt same practice, and it is excessive. Richardson & Company transfer grain of the Santa Fe at Galveston and are allowed 1 cent a bushel. This allowance is one-fourth of a cent more than the Peavey allowance at Omaha, but is forced upon the Santa Fe by an allowance of 2 cents a hundred at New Orleans by all railroad companies.

Mr. BALDWIN. Do you say as traffic manager of the Santa Fe that there was no necessity for the Union Pacific in the economical handling of its business to have these elevators, to own and operate them themselves, or to have it done by others?

Mr. BIDDLE. Absolutely necessary.

The CHAIRMAN. And equally necessary for the Santa Fe to have similar facilities at Kansas City?

Mr. BIDDLE. Yes, sir.

The CHAIRMAN. So that it simply comes to this—that you regard the allowance made under this contract to Peavey & Company as excessive?

Mr. BIDDLE. We have thought so, based on what we had to pay and what we knew others were paying for similar service.

The CHAIRMAN. The service must be afforded in the practical handling of the business.

Mr. BIDDLE. Yes, sir.

The CHAIRMAN. And those who furnish the service must be paid reasonable compensation?

Mr. BIDDLE. Yes, sir.

The CHAIRMAN. So far as you know, from your knowledge of the situation, with respect to the grain business, it is likewise important for the Burlington to have elevator facilities at the Missouri River?

Mr. BIDDLE. I so regard it.

The CHAIRMAN. How about the Rock Island?

Mr. BIDDLE. I should say that they were in exactly the same situation, and the Missouri Pacific.

W. C. STITH, freight traffic manager Missouri Pacific Railway Company:

Connected with the company for about twenty-five years.

Lines of the Missouri Pacific so far as grain-producing territory and markets are concerned are identical with those of the Santa Fe. "We are of the belief that the old method of shovel transfer of grain is inadequate to our needs, and that the exigencies of the business require some facility that will meet our demands and relieve our yards of the congestion that invariably follows an attempt to use exclusively shovel methods." "We have been unable to get elevator transfer service performed at Kansas City for any much less sum than the amount set forth in the contract of 1¼ cents per hundred pounds." Most of the grain which enters Kansas City is consigned to Kansas City. Transfer facilities at Kansas City are absolutely essential to prompt movement of business, to release of cars, and consolidation of loads. Are arranging to build a large elevator of about 1,000,000 bushels capacity. Have an elevator at Leavenworth and at Coffeyville. One at Leavenworth is leased to Denton Brothers for $5,000 a year. The one at Coffeyville is leased to Hall & Robinson at $300 a month. Did transfer through Merchants' elevator at Kansas City; thinks they paid 1¼ cents. This elevator was destroyed. After that transferred some by shovel at a cost of $1.75 to $2.50, but was continually in hot water regarding labor and the setting of cars, which was unsatisfactory. Found shovel transfer was in reality more expensive than elevator service because of detention of cars. Thinks the elevator at Kansas City was to be leased.

The payment to the Merchants' elevator was for the transfer from foreign cars to Missouri Pacific cars that were to go over the Missouri Pacific. The transfer at Coffeyville is for the purpose of consolidating the load. No allowance at all is made at Coffeyville.

129 Situation of the Santa Fe at Kansas City, where grain is delivered to the Missouri Pacific, is identical with the situation of the Union Pacific. Thinks charge at St. Louis is less than one-half of a cent a bushel. Missouri Pacific, like Santa Fe, has lines south and east of Kansas City. Missouri Pacific does not get a very large portion of the grain going east.

Hall & Robinson do a large part of the business over the Missouri Pacific and they are exporters through Galveston.

The lines which bring grain into Kansas City from the west are Santa Fe, Rock Island, Union Pacific, Missouri Pacific, Frisco System, St. Joe & Grand Island, Burlington, Kansas City Southern, Missouri, Kansas & Texas, and about the same number running to the East. Lines running east which have no rails west of the river are Alton, Wabash, Chicago, Milwaukee & St. Paul, and Chicago Great Western. The grain is divided among them and the eastern divisions of the through lines. There is a reconsignment charge on the Missouri Pacific for cars which go over other lines after coming in on the Missouri Pacific, and a refund is made if the same amount is shipped over the Missouri Pacific. The charge is $2. The Missouri Pacific takes some grain from the Missouri River, Omaha, and carries it through Kansas City to St. Louis. The rate from Omaha to St. Louis is less than the sum of the locals into Kansas City and to St. Louis.

H. GOWER, assistant freight traffic manager Rock Island System:

Rock Island pays for shovel transfer at Kansas City and St. Joe $1.75. Very little transferring is done by shovel. At Kansas City transfer through elevators is $2 for cars under 50,000; $2.25 for cars 50,000 to 60,000; and $2.50 for cars 60,000 and over. At. St. Joe transfer is made for $2 per car regardless of weight. The Rock Island found they could not operate elevators satisfactorily themselves. Contract at St. Joe runs for five years. At Kansas City arrangement has been in force for two or three years. Storage capacity of elevators at Kansas City is 6,320,000 bushels, the handling capacity 1,518,000. An elevator can not handle its entire storage capacity. Certain parts are reserved for handling, mixing, etc. Has always understood the mixing, blending, etc., to be a valuable part of the elevator service which a private owner makes out of his elevator in handling his own grain that comes in. His information is that by judicious mixing of two different grades of grain the combination will come out at an increased value of a half a cent or more. It is desirable to avoid all transfers possible in the movement of grain from point of origin to destination from the standpoint of the railroads. The Burlington, Rock Island, Santa Fe, and Missouri Pacific as to grain which they bring into Kansas City and which is there open

to competition for transfer eastward stand on the same footing as the Union Pacific.

Parties have agreed to put up a million-bushel elevator and handle the grain of the Rock Island for 1¼ cents per hundred, the same price as is paid Peavey & Company. These parties convey the idea that as they must compete with the Midland elevator they must have the same allowance. This proposition has been declined. If the allowance to Peavey is permitted to stand it is probable other carriers will have to make the same allowance. At Peoria the charge for transferring wheat is $3 and corn $2.50. Is of the opinion that no allowance should be made to shipper, but that transferring should be done by receiving line.

The Rock Island owns the elevator at Kansas City, but the elevator is an old one and the facilities are not adequate and more elevator capacity is desired, but a new firm will not come in under the present conditions and put up a modern elevator unless they are assured that they will be on absolutely the same basis as their competitors. The proposition was for an allowance of 1½ cents instead of 1¼. Knows of no instance where transfer service is rendered by other than a grain buyer. Rock Island owns an elevator at Horton, Kans., and have an interest in one at Topeka and two elevators at Chicago.

130 Shovel system is totally inadequate and wholly unsatisfactory.

Mr. BALDWIN. So at terminal points it is absolutely and indispensably necessary to the economical handling of the grain business of railroads to have an elevator?

Mr. GOWER. I think so.

If the service is exclusively for the benefit of the railway a reasonable charge should be made therefor. At Chicago no charge is paid for transferring grain going east. Conditions at Chicago, as far as the transfer proposition is concerned, are the same as at Council Bluffs and Kansas City. Were a strong buyer to own an elevator at Kansas City, the interests of the Rock Island would be better looked out for.

The owner of grain in addition to having his grain unloaded has the benefit of having the grain go through the elevator, mixing, blending, and sending it out at a higher grade. Ninety per cent of the grain carried by the Rock Island is billed only to Kansas City. Rock Island carries east about 25 per cent of the grain it brings into Kansas City. About 50 per cent of grain brought in by the Rock Island goes south over their lines. No allowance is made by the Rock Island for elevation at Chicago. The Rock Island leases two elevators at Chicago to Counselman for $12,000 a year. Character of complaints against Union Pacific allowance such that attach no importance to them. Does not know whether Rock Island has lost any business on account of payment made under Peavey contract.

J. F. TUCKER, chairman of the Central Freight Association:

Understands that for the transfer of grain through elevators the charge at Chicago is one-fourth of a cent per bushel. Where grain is

owned by an individual and goes into the elevator of that individual to be handled either by mixing, blending, grading, or shipping out in any sort of way, if it is on the through rate and transferred, one-fourth of a cent is the allowance. If it is not consigned on a through rate there is no allowance.

The members of the association are Michigan Central, Lake Shore, Pennsylvania, Baltimore & Ohio, Big Four, Erie, Grand Trunk, and all get grain transferred at Chicago for one-fourth of a cent per bushel, as the witness understands it. Practically all the grain that goes East goes on the balance of the through rate, and therefore has this allowance. The allowance is not paid to public elevators who handle the grain of the public.

G. H. CROSBY, assistant freight traffic manager of the Burlington road:

Shovel transfer formerly cost $1.25, and in later years $1.50 to $1.75. On grain hauled into Kansas City it is a terminal proposition for the Burlington just as it is for the Union Pacific. It is put into the market for competition by the eastern lines. A very small proportion of the grain hauled into Kansas City by the Burlington is hauled out by them. Burlington makes allowance of 1 cent per 100 at Burlington, Iowa, for unloading and transferring. A contract has been made by the Burlington with Harroun Brothers Grain Company to erect a million-bushel elevator and transfer such grain as the Burlington may wish transferred for $1.75 per car with the understanding that if anyone will do it cheaper they will reduce their price. This allowance is not made on grain that the Harroun company want transferred. This is regardless of the weight of the car. But for grain owned by them to be unloaded into their own elevator to handle at their own convenience no allowance is made. It is the understanding of the witness that one of the inducements to build grain elevators for the purpose or transferring grain is the profit and advantage they receive from mixing different kinds of grain as it goes through and bringing out a product that is more valuable as a whole than the individual products. Witness thinks, however, that if the contract of the Union Pacific with Peavey is maintained, it will be necessary for the Burlington to make the same allowance to Harroun Brothers. In fact, there is an understanding that if
131 that contract is maintained the Burlington will have to meet the allowance made to Peavey. Having central elevators is an advantage to firms having line houses in the country, as the buyers may buy poor grain which, if mixed with other grain, would be more valuable. There is also an advantage in stopping the grain at Kansas City and Council Bluffs in that it could be held and shipped to Minneapolis and southern markets easier than from Chicago. Regards the practice of allowing grain owners allowances for unloading grain into their elevators where it can be mixed, blended, etc., as bad practice, as more to his advantage than to the railroads. One

cent is allowed at Burlington because the rate of $1.75 can not be obtained there. The arrangement at Burlington of paying 1 cent was the result of competition with Council Bluffs and also because it was necessary in order to get the service performed. Eastern connections will allow cars to go to Burlington when they will not allow them to go to the Missouri River, so the Burlington have their cars released at Burlington. There are no other elevators at Burlington, and it is impossible for the Burlington to get the grain transferred for less than 1 cent per 100. Finds it to advantage in handling equipment to transfer grain at Burlington. Can not operate elevator profitably. "As I have attempted to explain, on this transfer business, most of those houses were built for other purposes."

Commissioner PROUTY. If you need an elevator to transfer grain at that point and can not profitably build one yourself and operate it, why do you say you are forced to pay a cent a hundred by competition?

Mr. CROSBY. Other people are paying a cent or more and that creates a condition as to rates, whether it is high or low; the rate is a certain figure, and if anybody pays an allowance from that figure the net rate is different.

Where transfer takes place it is necessary to have some modern method of doing it. Shovel method is not practicable for large amount of business.

Commissioner PROUTY. Your trouble with this business seems to be that you pay the grain man who owns the grain?

Mr. CROSBY. The parties who are engaged in the grain business are also engaged in the elevator business. * * *

Commissioner PROUTY. If you pay them an elevator charge, that gives them an advantage so they can pay so much more—that is to say, by making these allowances it gives them the privilege of paying more on your line?

Mr. CROSBY. The man who has facilities on our line. We do not pay other people because it costs us money to get it of other people.

Mr. LATHROP. The service in running that grain out of the car and through the elevator and into another car does not consist solely of just the transfer alone?

Mr. CROSBY. No, sir.

M. LATHROP. There is the service of mixing, blending, grading, clipping, etc.?

Mr. CROSBY. Oh, yes; that is not for the benefit of the carrier. A firm could not afford to build an elevator for transfer purposes alone on the present allowance.

Mr. HEFFELFINGER (recalled):

Peavey & Company buy practically no grain from Burlington tracks, but this is not because they have no transfer allowance. Peavey & Company buy grain on the Rock Island and send it to Chicago because it goes to Chicago without expense to them. Would

build elevators on the Burlington if they could get desirable locations. Have built more on the Union Pacific because it is more advantageous to handle grain over one line than over many. The fact that all the business of one grain dealer is on one road has nothing to do with the elevator transfer. Peavey & Company have elevators on the Great Northern and Northern Pacific. If it were not for the elevator at Council Bluffs, Peavey & Company could do their business just as well at Chicago, but would not have as many markets to reach. Cars of other carriers east of the river when loaded by Peavey & Company are transferred to the elevator at Kansas City or
132 Council Bluffs. It makes no difference to the Union Pacific what the initial is; they use all cars of other companies on their lines.

Mr. HEFFELFINGER. * * * I presume any road would be glad to use the equipment of any other road in times when they were in need.

Mr. LATHROP. If that is so, and if they have the power to do it, the fact that you stop it and run it through the elevator is not because these foreign carriers would not take out the cars that came in, but simply in order that you may get the cent and a quarter?

Mr. HEFFELFINGER. Most assuredly; if we could not get the cent and a quarter on grain we handle, where would we be? What kind of business men would you take us to be, to put a lot of money into these houses? If this contract were abrogated with us, the house would be absolutely useless. We could do just as well at any other point. In the elevator of 1,000,000 bushels capacity at Kansas City transfer is made of 80 cars a day. The rate for transfer in public elevators at Chicago is three-fourths of a cent per bushel, including ten days' storage.

Mr. D. MILLER. If the Union Pacific Railroad should find themselves able to get their transferring from car to car performed without expense to them, would you still insist that the grain you buy on the Union Pacific should go through your house at Kansas City?

Mr. HEFFELFINGER. I would insist upon their living up to their contract by reason of which we made this large investment.

Mr. MILLER. I understand that all the connections of the Union Pacific at Council Bluffs will receive and transfer grain for the Union Pacific without cost to them.

Mr. HEFFELFINGER. That may be, for all I know.

Mr. MILLER. Then why should they pay a cent and a quarter when they can get the work done for nothing?

Mr. HEFFELFINGER. I know it is strongly competitive. I know the Burlington is seeking to get our grain.

Mr. MILLER. They pay a cent and a quarter for work which they can get done for nothing.

Mr. HEFFELFINGER. I hold it is absolutely not so. I will further state that the Burlington road has had about one-third—in looking up the last two or three years—of the grain that the Omaha Elevator Company has handled in Nebraska through the Council Bluffs house.

D. MILLER, vice-president, in charge of traffic of the Burlington System:

Regards the allowance of 1¼ cents for a transfer of grain at Council Bluffs or other points excessive because it is not a transfer from car to car, but is taken into the elevator and mixed, blended, etc. This is absolutely necessary for the grain men, while all the railroads require is a transfer from car to car. The payment of 1¼ cents when it can be done for one-fourth as much gives the grain dealer a monopoly of the grain on the line, and amounts to a reduction in rate or a rebate. The Burlington owns an elevator at East St. Louis and performs the transfer service for one-fourth of a cent a bushel, including ten days' free storage, at a profit. An allowance of 1 cent is given to Green, who is the same on the Burlington as Peavey is on the Union Pacific, but this is forced by competition. Green insists that his grain must go through his elevator for mixing. Other lines entering Kansas City stand in regard to the grain business in the same position as the Union Pacific, and the Burlington makes no allowance because the connecting lines assume that. Burlington and Santa Fe haul most grain into Kansas City and haul less out than other roads.

The Burlington would transfer grain from the Union Pacific cars to Burlington cars at Council Bluffs without charge. This transfer could be made so as to release the cars as rapidly as they are now released in an elevator of 250,000 bushels capacity, in which 200 or 250 cars per day could be taken care of. The Burlington would guarantee to take care of the grain and would be equipped to do the transfer itself. The larger house built by Peavey & Company was for the grain dealers' business and not merely for the railroad transfer. When loaded in foreign cars a large portion of the grain could be forwarded through to Chicago without transfer, and thus the allowance to Peavey need not be made.

133 At St. Louis the Burlington has about $300,000 invested in the elevator, and net results the year before showed $15,000 profit at a charge of one-fourth of a cent for transfer. Some storage beyond the ten days was charged for, but most of it was from a transfer charge. Burlington has made a contract for the construction of a million-bushel elevator at Kansas City. A terminal elevator is indispensable to the expeditious and economical handling of grain.

Commissioner CLEMENTS. You say this (allowance to owner of grain) is a vicious practice and tends to create a monopoly in favor of shippers who have this allowance?

Mr. MILLER. Yes. The effect of this allowance on the independent buyer is that he has to sell to the terminal elevator people largely. It affects the man who has grain to sell by decreasing the number of markets he has to sell in, and he is confined largely to terminal elevators. It does not cause him to get a less price, because there is enough outlet to keep the prices up.

Mr. STUBBS. Mr. Miller, is it not true that every line * * * has some particular firm like Peavey & Company? * * * That is true, is it not?

Mr. MILLER. Yes, sir; that is true. It confines the business to those few people.

Mr. STUBBS. Do you wish to be understood, or do you believe it to be the case, that that fact arises from the Union Pacific contract with Peavey & Company?

Mr. MILLER. No; I do not think that that contract is responsible for that.

Mr. STUBBS. Then there must be some other reason for it?

Mr. MILLER. I think that these terminal elevator arrangements are responsible for that situation. * * *

It gives them to that extent an advantage, and therefore they control the business. The contract with Peavey & Company is only one of them.

The Burlington does not transfer the grain of Harris at Burlington, because he insists on having his grain go through his elevator and that he be paid an allowance of 1 cent to put him on a parity with other dealers. The contract with Peavey is one element which is responsible for this, because the Union Pacific is one of the principal competitors of the Burlington.

The 30 or 40 per cent of grain on the Union Pacific which is bought by independent shippers eventually is bought by the large dealers. Arrangements with elevators result in better handling of the grain and redounds to the benefit of the grower and shipper, but the evil is in the excessive allowance for transfer through the elevator. The elevator system of handling grain is absolutely necessary. The grain need not necessarily go to these particular elevators if equal facilities were open to other elevator men on all the roads. If there was no allowance, or if the allowance were substantially equal, the monopoly would not be created by the railroad. There are a number of grain dealers who operate a country line of elevators and have no terminal elevator.

The Great Northern built an elevator at Duluth of the capacity of 3,000,000 bushels. This is not simply for transfer, but is used for storage of grain during the winter, when navigation is closed. At Duluth one-half cent a bushel is charged for transferring grain from cars to boat. The great Northern also built an elevator at Minneapolis of capacity of 1,500,000 bushels, but does not operate it.

Can prove that the price paid on the Union Pacific for wheat is higher than is paid on the Burlington.

VOLUME I.—DEPOSITIONS TAKEN IN 1903.

JAMES E. SEAVER, vice-president and general manager Midland Elevator Company, Kansas City, Mo.:

Line elevators are companies operating one or more elevators not confined to one particular station. Independent elevators are elevators owned by a firm or corporation; ordinarily just one house at one place. Independent dealers are dealers who have no elevator facilities. The Midland elevator buys very little grain from independent-line elevators and independent dealers. Buys almost entirely from

the farmers. Line elevators are competitors of the Midland Company. Independent elevators and independent dealers are competitors of line elevators.

134 There is only one firm besides the Midland who has a terminal elevator at Kansas City, the Rosenbaum Grain Company. The Midland Elevator Company buys some grain on the floor of the exchange in Kansas City. Some elevators on the Atchison, Topeka & Santa Fe, Missouri Pacific, Rock Island, and Kansas City & Northwestern are accessible to the Union Pacific.

At 31 out of 40 points where the Midland Elevator Company has elevators there are other line and independent elevators competing for the business. Midland elevator handles about 30 per cent of the Union Pacific receipts through the elevator at Kansas City.

More grain is purchased by independent dealers and shipped to Kansas City than by the Midland Elevator Company.

There are 150 stations on the Union Pacific proper in the Kansas grain belt.

The Midland Elevator Company has been operating in Kansas since 1890. All of the 40 elevators throughout Kansas have been added since the allowance was made. The 40 elevators of the Midland Elevator Company are situated on the property of the Union Pacific, as is also the Midland elevator at Kansas City, for which nominal rents are paid.

E. P. Peck, vice president and general manager of the Omaha Elevator Company:

In Mr. Peck's testimony, independent dealers means dealers having an elevator. There are very few of what are known as track dealers. Of 202 elevators on the Union Pacific in Nebraska, 127 are owned by five line companies and 75 by independent dealers, and the Omaha Elevator Company owns and operates 71 of the 127. There are five or six stations on the Union Pacific where the Omaha Elevator Company has the only elevator. Thinks there are 112 stations on the Union Pacific in Nebraska where grain is shipped, and there are, therefore, about 41 stations on the Union Pacific in Nebraska where the Omaha Elevator Company has no elevators. Omaha Elevator Company buys largely of farmers. There is a large mill at Schuyler, Nebr., on the Union Pacific, where a large amount of wheat is milled.

There are only 2 terminal elevators at Council Bluffs, Iowa, one owned by the Omaha Elevator Company and the other by Trans-Mississippi Grain Company. There is competition between carriers at some stations in Nebraska.

Witness thinks Ferguson, a dealer in grain on the Burlington road, has 80 elevators.

Peavey & Company in 1890 bought a line of elevators owned by the Omaha Elevator & Grain Company and began business.

Peavey & Company do buy occasional cars of grain at points where they have no elevators. Their operations are confined to the Union Pacific territory.

VOLUME II.—HEARING OF SEPTEMBER 17, 1906.

Mr. HEFFELFINGER, of the firm of Peavey & Comany:

Peavey & Company control the Interior Elevator Company, the Republic Elevator Company, and the Duluth elevator at Minneapolis. At Duluth, the Globe Elevator Company, the Belt Line Elevator Company, and the Peavey Duluth Terminal Company are controlled by Peavey & Company. At Chicago, they own the Peavey Elevator Company. At Omaha, the Omaha Elevator Company, and at Kansas City the Midland Elevator Company are operated under Peavey & Company. The British American Elevator Company at Winnipeg is also under the control of Peavey & Company.

At Minneapolis, of a capacity of from thirty-five to forty million bushels, Peavey & Company owns 6,500,000. At Duluth, of a capacity of thirty-five or forty million bushels, Peavey & Company have 12,000,000. At Chicago, 2,750,000 bushels capacity, and at
135 Omaha 1,500,000 bushels capacity, and at Kansas City, 1,000,000 bushels are controlled by Peavey & Company. This includes all the terminal elevators controlled by Peavey & Company.

In the country elevators the grain of the farmers is stored at a legal rate. They are allowed free storage for twenty days. That is, if they bring in grain and want to ship it out, there is a legal rate charged, covering the shipping and including 20 days' free storage. If they sell it to Peavey & Company there is no charge. When grain is bought on a margin no charge is made. Peavey & Company buy most of the grain that is brought into the elevator.

The Terminal elevator at Omaha has about 74 line houses on the Union Pacific. The Midland at Kansas City has about 50 line houses on the Union Pacific. The Monarch at Minneapolis has 120 houses, nearly all on the Great Northern. Union Pacific owns no stock in the elevator companies.

Peavey & Company have very little apparatus at country houses for cleaning and blending grain. Cleaning is done mostly at the terminals. Mixing may be done at any country station.

Of the grain received at Omaha by Peavey & Company, 60 per cent is corn and about 5 per cent is cleaned. Wheat is almost all cleaned. Wheat received last year amounted to 15 per cent. Oats amounted to about 15 per cent. A very small percentage of the oats is cleaned. None of the grain bought along the line of the Union Pacific in Nebraska goes by the elevator. About 60 to 75 per cent of the grain bought in Kansas went to the elevator at Kansas City. Approximately 80 per cent of the grain that goes to Kansas City goes through the Midland elevator.

Prices to be paid on grain at Kansas City are fixed largely by the Kansas City market. The grain bought on the Union Pacific is not billed to Omaha, but is all billed to St. Louis. Grain is shipped from the Omaha elevator to Minneapolis, Chicago, New York, Baltimore, Philadelphia, St. Louis, Kansas City, and some to New Orleans and

Galveston and possibly Boston and Duluth. Grain shipped to Duluth and Minneapolis is not sent by way of St. Louis, but all grain is billed to St. Louis from Nebraska points. Peavey & Company pay the proportion of the through rate to Omaha which is the same as the local. If Peavey & Company had no elevators at terminal points, they would ship to grain dealers who would buy it. With the same investment in the country that they have at Council Bluffs, Peavey & Company could make as much profit as they do now. "The assumption all along, Mr. Chairman, and members of the commission, that Peavey & Company must have an elevator at Council Bluffs and Kansas City in order to take care of their grain business, I want to absolutely dispute. I want to make it forcible that we offered to sell the elevators and agree not to build any more at Council Bluffs or Kansas City; that we can handle our grain business in the country just as well without those elevators as we can with them."

Peavey & Company in building the elevator at Council Bluffs bonded it for its cost, and have paid off about $15,000 a year from the profits of the grain business, not out of the elevation, amounting in all to $105,000 of the cost, and have paid dividends beside. Most of the grain in the elevator at Duluth is shipped down the lakes and is not consumed in Duluth. No allowance is paid at Duluth or any other place other than Council Bluffs and Kansas City. None of the elevators at Minneapolis were built since those at Council Bluffs. Are rebuilding one at Duluth which burned.

Peavey & Company handle grain at Duluth in the usual manner. Duluth is not only a market for the mills at Duluth but is a world market. "You can go into Duluth and in an hour sell 5,000,000 of stuff and you could not sell 100,000 bushels in Omaha without knocking the price in twenty-four hours." Peavy & Company sell grain in Chicago that is stored in Omaha, Minneapolis, or Kansas City. There was received at Minneapolis in 1905, 96,000,000 bushels, and there was ground there about sixty or sixty-five million. At Duluth grain can not be shipped after December when navigation closes and does not open until the first of April or May. For a number of years previous to 1905 there was no carrying charge at Duluth.

136 The grain year is the same as the fiscal year. The total receipts of grain at Omaha elevator during the year ending July 30, 1906, was 9,500,000 bushels, of which 7,500,000 were from the Union Pacific. The other 2,000,000 came largely from Iowa. No allowance was received on the grain from Iowa. The grain from Iowa was treated in the same manner as the grain which came from the lines of the Union Pacific. For the year ending July 1, 1905, the receipts at the Omaha elevator were a little over 5,500,000 bushels, all of which came from the Union Pacific lines. For the year ending July 1, 1904, the receipts of grain were about 5,750,000. It was estimated that the receipts of the Omaha Company were 30 per cent of the entire shipments on the Union Pacific. Of the balance, the Trans-Mississippi Company might handle four or five

million bushels. The balance is handled by independent elevators, track shippers, and farmers' shipments.

The grade of the wheat along the line of the Union Pacific in Nebraska is Chicago Grade No. 2 hard. It might be Omaha Grade 2 hard and 3 and 4. The price of grain at Omaha is affected by other markets. It was formerly the custom to charge the Union Pacific on all grain going into the elevator and refund the allowance on any which was used locally, but lately the charge has been paid on outgoing grain. The allowance is paid irrespective of the kind of car that brings in the grain, of the kind of car that takes it out, and the point to which it is sent. The Omaha Elevator Company transferred approximately half a million of grain for Mr. Cowgill for which he paid no charge, showing they were willing to transfer for other people, but the Union Pacific paid the regular allowance of 1¼ cents per 100. The identity of this grain was preserved in the elevator. The Omaha Company does practically no storing for other dealers in Nebraska, but in Kansas some grain is stored. Grain from the Omaha elevator went to Baltimore, St. Louis, Chicago, Minneapolis, and Kansas City. The through billing to St. Louis was used because it was the custom; grain could be rebilled at Omaha to other markets.

Prior to the construction of the elevator at Omaha, Peavey & Company operated an elevator of about 300,000 to 500,000 bushels capacity. Operated a house owned by the Union Pacific which was torn down when the new elevator was built and received 1¼ cents allowance. No rent was paid on the old house.

In the information of the witness none of the minority stock in the elevator companies is owned by stockholders of the railroad company. No official of a railroad company is an official of the grain company.

Millers had rather buy grain of a grade direct from the country than grain after it is mixed in the elevator, because it is a little better.

There is no reconsignment charge on grain which is sent to other destinations after being billed to St. Louis. Thinks there is no reconsignment charge to farmers for this service. As a matter of fact, although grain is billed to St. Louis, it goes into the elevator and may be mixed with grain from Iowa and goes wherever the market may dictate.

"We might buy it (grain) under the Chicago market out in Nebraska. That might be a cash market which was 1 cent under future. In Nebraska we would buy on the basis of the discount. We might hold the grain there (Nebraska) until next May, then we might send to St. Louis and realize a cent a bushel more, a cent a bushel premium, thereby making a profit of 2 cents per bushel for carrying the grain." The price of grain to the country buyer is determined by the highest market.

Of between fifty and eighty million bushels of grain produced on the Great Northern, Peavey & Company handle but 5,000,000 bushels, while on the Union Pacific they get about one-third of the entire

business. The Great Northern occupies a much larger territory and Peavey & Company do not operate at as many stations proportionately. Peavey & Company own 70 or 80 country elevators on the Northern Pacific, but they are operated independent of terminal elevators. If it is unloaded in the terminals of Peavey & Com-
137 pany, it is only when the manager of the terminal buys it of the manager of the country line. There is no line of railway where Peavey & Company have the only elevators on the line. Out of 450 stations there are about 30 where there are no other elevators. Farmers will sometimes haul grain 20 miles for 1 cent a bushel extra. Does not think the allowance of 1¼ cents enables Peavey & Company to enter into more effective competition on the Union Pacific. A large percentage of the receipts of the company is from farmers. Thinks agreement on the price to be paid for grain between dealers does not eliminate competition.

The Union Pacific is the only line in Nebraska on which Peavey & Company have elevators. The Union Pacific is the only line on which Peavey & Company do any track buying. This is because they do not branch out; because it is cheaper to do as much of their business as they can on one line. If a railroad would assure them a good return on the money invested, they might be willing to go on another line.

Mr. E. P. Peck, general manager of the Omaha Elevator Company, Omaha, Nebr.:

Has been connected with the Omaha Elevator Company for sixteen years. Peavey & Company, at about the time he came with the company, bought what was known as the Omaha Union Grain Company elevators, about 35 in number. At the time he entered the company it was operating a 500,000-bushel house at Omaha, owned by the Union Pacific Company and some other parties. Thinks they paid rent for it. In the old house at one period the allowance was 1¼ cents. Has received from the Union Pacific either 1¼ cents or 1½ cents ever since he has been connected with the company. Also operated a house that burned down at Council Bluffs, which held about 750,000 bushels. These elevators were operated under a written contract with the railroad company.

All grain on the Union Pacific that goes to Council Bluffs is billed to St. Louis. A new bill of lading is made out when the grain is shipped out of the elevator.

At the time the grain goes into the elevator the ultimate destination is not known, and it is not known how long the grain will stay in the elevator. When the grain is shipped from the country it is not known whether or not it will be mixed or blended. There are in the elevator cleaners, a drier, a purifier to purify oats, the Hess system, in which sulphur is used to brighten up the oats. The elevator is operated in the same way that terminal elevators and mixing houses are ordinarily operated, and the grain is shipped out to whatever market seems at the time the best.

Two million bushels of grain were bought during the previous year on other lines than the Union Pacific Railroad; part of it came from Iowa and part from Nebraska over the Burlington, North Western, and Rock Island. Are still buying grain off other lines. That grain is not shipped out on the billing of the Union Pacific. Some of the grain that goes from the Omaha elevator goes to the Midland elevator at Kansas City and the allowance is paid on it there. The proportional rate from Omaha to Chicago is 9¾ cents on corn, while the local is 15 cents.

To store grain at Omaha in a public elevator for twenty days would cost three-fourths of a cent a bushel. Some grain of the Trans-Mississippi Company has been elevated through the Peavey elevator, because their elevator burned. Practically no grain other than that of the Trans-Mississippi Company and Peavey & Company goes through the Peavey elevator. Track buyer could do business Peavey does without elevator. There are about 200 elevators along the line of the Union Pacific. Peavey & Company own about 74, the Trans-Mississippi Company own about 24 or 25, and the remainder are owned by independent buyers. These buyers sell their grain at Chicago and Minneapolis. The majority of this grain is sent through to Chicago and does not stop at Omaha. Also sent to St. Louis, Memphis, and Cincinnati. The through rate is no less than
138 the local in and proportional rate out. The grain from Iowa goes to Chicago on the proportional of 9¾ cents and to St. Louis at 6¾ cents. Five cents is the lowest rate into Omaha, from points in Iowa. Although the tariff naming the proportional states "at and west of the river," the railroads take grain which originated in Iowa on the proportional east.

Commissioner PROUTY. It must follow, Mr. Peck, that grain shipped from interior points to Chicago by the Union Pacific, straight through without being unloaded, pays a rate of a cent and a quarter a hundred pounds more than your grain does?

Mr. PECK. We pay the same tariff exactly as anybody else.

Commissioner PROUTY. I understand; but you get back a cent and a quarter for this transfer there?

Mr. PECK. We get it back for performing the service of relieving the equipment.

Commissioner PROUTY. I am not talking about the justice or the lawfulness of it, but I am saying the fact is that it costs him a cent and a quarter more to get his grain through?

Mr. PECK. Yes.

Commissioner PROUTY. Now, is that repaid to him on the grain in Chicago in any way? Does he get an allowance from the elevator in Chicago to offset that?

Mr. PECK. Not at the present time; I do not think he does.

An allowance was, at times during the previous two years, paid to the independent shipper at Chicago for releasing equipment. The independent shipper performs no service, has been at no expense, whereas Peavey is at expense of relieving Union Pacific equipment.

The Union Pacific makes the allowance to all elevators at the time of hearing. Grain coming in by some other route, the Burlington, for example, is allowed cost of transfer and weighing, whatever the cost is. The cent and a quarter allowance leaves no margin of profit to Peavey, i. e., the expense of running the elevator is more than the allowance. Does not consider that they are at any advantage in the market by reason of getting 1¼ cents. The operating expense of running the elevator for the previous nine years was more than 1¼ cents. The operating expense includes the storage of grain, the unloading of the grain, and the mixing of the grain. It also includes the drying, purifying, and handling of the grain, but does not include office expense, expense of management, insurance on grain stored, investment, and depreciation. The expenses of the elevator are charged on the one hand and the 1¼ cents on the other; no credit is made for the profit made in the handling of the grain.

Fifteen thousand dollars of the bonds of the elevator is paid off annually from the profit of the grain business of all the elevators.

The tariff of the Burlington says: "This company will pay the cost of transferring grain from car to car for the purpose of releasing foreign equipment or for ascertaining weight." It was the established custom that where grain was going through the transfer charge at Omaha was borne by the connecting line. The Rock Island does its own transferring at Omaha and has a small house. The Great Western does its own transferring at South Omaha. Before the Peavy elevator was built the eastern lines paid for transferring grain at the Union elevator at Council Bluffs. The Burlington has never paid Peavey & Company anything for transferring grain under the tariff quoted, as tariff is just out and the manager has never asked them to. Since the through rate is the same as the local in and the proportional out, there is no advantage in the through bill of lading, and the service performed by Peavey is same in both instances. The grain on which the allowance is paid does not all belong to Peavey or the Omaha Elevator Company.

Mr. KELBY. But substantially all the grain that has been unloaded into your elevator has been your own property?

Mr. PECK. A large percentage of it.

Mr. KELBY. Ninety-nine per cent of it?

Mr. PECK. I don't know.

139 An elevator of the character of the Peavey elevator and the operation of it would not be necessary as a mere transfer proposition. Peavey & Company could not erect an elevator of the size and capacity of the Peavey elevator and conduct it as they do and treat grain as they do for 1¼ cents per hundred if they had no interest in the grain.

Direct transfer through a transfer elevator from car to car could be done for $3.50 per car when there were plenty of cars. When there is a large volume of business, there must be some storage to relieve the western cars, and for that reason Union Pacific required an elevator of 1,500,000 bushels capacity. Direct transfer from car

to car could be done in a mere skeleton structure, but this would not allow storage.

A. B. JAQUITH, Omaha. For thirteen years prior to July 1, 1903, vice-president and manager of Omaha Elevator Company:

Peavey & Company operated two terminal elevators at Omaha prior to the building of the new one. One of these was operated for about eight or nine years. The capacity of the two was 1,750,000 bushels. During these years they received allowances from the Union Pacific, part of the time 1½ cents and part of the time 1¼ cents per 100. The terminal elevators at Omaha were a necessity in the way of business, because it would be a saving to have only one set of machinery for cleaning, etc. All the machinery and appliances were at Omaha and Council Bluffs. There was a country house fitted up in 1900 for the purpose of handling grain that went to Denver, but not the grain going east. If the machinery were in the country elevators, the expense would probably run up to between three and five hundred dollars per elevator, which would not include cost of machinery; only the wear and tear and the additional labor. Besides cleaning, there is proper and legitimate mixing of grain, raising its grade, and blending the different qualities of grain from different sections of the country or territory, which at times can be done very profitably and can not be done at the local point. For instance, the north half of the territory may have very heavy wheat and the south half very light, and if sold separately would practically sometimes in the purchase price show no margin, but if properly mixed and manipulated and sampled out at terminal would bring a good profit. Storage would be cheaper in the country. Now, on the advantages, you have stored up at your terminal grain that you can absolutely bet on its quality because you know it. A miller wants 25 cars or an exporter is short one or two cargoes and he must fill that cargo or suffer the penalty that the ship charges. Hence a terminal elevator often secures a good premium over prices that he could secure if shipped from various country points, which could not be done so quickly. This demand occurs in one form or another from one place to another right along.

I consider such a terminal is absolutely necessary and essential to the proper management of any country line, and if competition is close any country line may go broke on close competition as compared to a country line that has its terminal.

Has been in the grain business for twenty-nine years or thirty years. In some respects an elevator at Chicago would be as useful as an elevator at Omaha, but for Nebraska grain the elevator at Omaha is more advantageously located than any other in the United States, as it would reach more markets than any other one place. Grain at Omaha can reach markets at New Orleans, Galveston in the southern trade, and the Minneapolis mill trade. It can also reach Baltimore, Philadelphia, Newport News, New York, or Boston. Witness says that the elevators control the Omaha market. He performed the

same services of transferring grain from Union Pacific cars within the previous three months and put in a claim and the Union Pacific refused the claim. Now they have published a tariff and will pay for the transfer.

The business of the elevators affects the market price of grain in that "when every elevator in Omaha was receiving this ad-
140 vantage they were bidding more in the country than they could secure or did secure for the grain. They divided the elevation charge in order to secure the business." The grain that gets the benefit of the allowance brings more on the exchange than grain that does not. "Does that occur right along? Is that a matter of ordinary custom on the grain exchange?" There are periods of time when it is only payable to the Omaha Elevator Company and the Trans-Mississippi Elevator Company; that for certain reasons of their own they may not pay me or John Jones a premium for that grain; but ordinarily on the market, as is shown when all elevators are receiving it, they are perfectly willing, and I could bring plenty of testimony to show, from the elevators and buyers themselves, that they paid—in other words, that they divided this one and a quarter elevation charge—paid me enough money for the grain on the market in order to secure a profit for them, splitting the elevator charge."

On lines not paying an elevation charge now grain can not be sold as readily as on the Union Pacific and does not command as large a price, generally a half to three-quarters of a cent difference per bushel on wheat or corn.

A 100,000-bushel house could be arranged to transfer or hold up 75 cars if necessary and transfer more grain than the Peavey elevator, more cars of grain. It is true that at times the Union Pacific moves in more cars than there are cars to take the grain out. A 100,000-bushel elevator would be sufficient if the cars were always there to put the grain in so as to release the inbound equipment. Witness thinks an elevator of 300,000 bushels would take care of and store, even in a time of rush, as much grain or more than has ever been necessary to be taken care of in a time of rush.

It often happens that country elevators are full and it is desirable to relieve them, and whether or not they can be relieved depends upon the rapidity with which the equipment can be released at Omaha. There have been times when Union Pacific cars were loaded at Council Bluffs for shipment east, and on these cars the allowance was allowed. Thinks they wanted 100, or 200, or possibly more. Rather difficult to state, but should judge that an elevator which could transfer as much grain as the Peavey elevator could be built for $50,000. "Now, I am not an expert on that."

Mr. GREEN. Now, what would be a fair price for transferring grain through the Peavey elevator at Omaha, considering all the circumstances?

Mr. JAQUITH. It would entirely depend on how much you would transfer—what you would depend on—or the volume it would move.

Mr. GREEN. At the time you had charge of it, what would be a reasonable fee for the service performed—a mere transfer service for the

railroad company, taking into consideration all your other business and everything else?

Mr. JAQUITH. I would certainly contend it was worth 1½ cents.

Mr. GREEN. Of course, while you operated the elevator you got all the allowance you could?

A. Why, surely.

Q. It depended upon what the Union Pacific felt they could afford to pay?

A. Yes, sir.

Grain handled by Peavey through the elevator during administration of witness ran from practically nothing in 1894, when there was a failure, to about 8,000,000.

There are in and about Omaha probably eight or ten elevators, having a capacity of six or seven million bushels. The larger ones are controlled by the Omaha Elevator Company, the Terminal Elevator Company, the Updike Elevator Company, the Merriam & Holmquist Elevator Company, and the Trans-Mississippi Elevator Company. Probably seven elevators have been built since 1903.

Q. Now, these elevators that have been built there the last two or three years have been built without any regard to the allowance?

A. Not all of them, but a fairly good proportion of them.

141 Elevators like the Updike on the North Western and Nebraska-Iowa on the Burlington would not have been constructed "unless they had something coming."

Witness thinks the allowance paid for transfer is really a rebate and is a restriction of trade as against people not owning elevators or large lines of business. It is not contended that all of the new elevators erected are to receive allowances in the nature of a rebate.

While operating the elevator prior to the contract Peavey & Company received allowances which varied from time to time, but it was never less than 1¼ cents.

"The Union Pacific contract was always open, you know, and the B. & M. and these other various roads paid the money and in some cases, it has been demonstrated, 3 cents a hundred instead of 1¼, and I construe that to be the same as a rebate * * *." The payment of allowances by the railroad companies has been a detriment to the Omaha market. "The Union Pacific has been a benefit, but other roads have figured to carry it around Omaha or we would have had a better market to-day."

Witness contends that the terminal elevator is necessary for the operation of a line of country houses, and it will be built anyway, whether at Chicago, Duluth, or Minneapolis, and any man having elevators in Nebraska will build his terminal on the Missouri River or in Nebraska with or without elevation, for the reason that there he has a better outlet for his grain and reaches all the markets, and could not afford to put his elevator in Duluth or Chicago or St. Louis or New Orleans.

Witness had transfer service performed by the Updike Grain Company at Omaha, and paid three-fourths of a cent a bushel and filed claim for 1¼ cents a hundred, but has not been able to collect the charge from the Union Pacific. On cross-examination did not know where grain originated or where it was when he bought it.

Commissioner CLEMENTS. Can you tell from your experience to what extent the selling price of grain is increased by this manipulation under one form or another, this cleaning and purifying, blending, etc?

A. Well——

Q. How much profit is there in that upon an average, where the owner of the elevator is the owner of the grain?

A. You can not very well average it. In my experience where you do not keep a terminal and a country line separated, it is very difficult to tell where the profit exists. Where there is a carrying charge of 7 cents per hundred for May wheat, and the carrying charge on oats, where you stack up this grain on the basis of Chicago market, by reason of its location at Omaha, and it finally goes, perhaps, to Baltimore, New Orleans or Minneapolis, at a 3-cent-a-bushel better basis, there is a fairly good margin in the terminal.

Q. You can not answer the question?

A. I can not say offhand on an average what is cost, and no other man can.

Q. You can not say how much profit there is in this manipulation where the elevator man is the owner of the grain?

A. It depends on the capacity of the elevator.

Mr. GREEN. Can you state the source of profit that may be placed to the credit of this terminal elevator in your business as you handled it from year to year?

A. Sir?

Q. During your administration could you form any judgment as to the source of profit of the business attributable to the terminal elevator and the handling of grain in it?

A. I don't think that question could be fairly answered. I have already answered it by saying that as against competition they can not—any country elevator—run as against close competition without a terminal.

Q. That is virtually in the nature of a conclusion. That don't give the whys and wherefores.

A. The judgment of twenty years is better than a guess per bushel when you can not furnish the figures, in my judgment.

142 Sometimes by blending, mixing, etc., 3 cents a bushel can be added to the price of the grain and at times not more than one-half a cent a bushel can be added.

Q. Suppose you have wheat that is rather poor, what in the northeast would be called "no-grade wheat," can't you treat that so that you can use part of it in mixing it with higher grades and bring it up?

A. In buying it at its actual value on the tables there are times when you can mix it with qualities that you have upon the table at the same time through your elevator and secure 4 or 5 cents a bushel on the grades, but those are snaps that you pick up from time to time. "I don't know of an elevator on the Missouri River but what to-day are putting up wheat in their terminals and hedging it for May or December because the carrying charges are good and there is a profit in it."

It is an advantage to the shipper as well as to the railroad company to get the cars back into the country quickly to be reloaded, and the nearer a terminal elevator is to the country elevators the more of an advantage it is.

At the time witness purchased the grain on which he paid the elevator charge he purchased it on the exchange for May delivery and did not know whether the grain was in the elevator then or whether it came in later.

In 1890 Peavey & Company purchased a line of elevators in Nebraska and leased the elevator at Omaha from the Union Pacific for about $14,000 a year. At the same time they leased the elevator belonging to the six railroad companies at about $5,000, which they operated, except for a short time, up to 1899. Prior to the purchase of the line elevators by Peavey & Company the Union Pacific was paying an allowance to their predecessors. "Greenleaf & Baker had an elevator on the Missouri Pacific and various other people did also. They did not have contracts, but they received the money just the same, and the B. & M. road and various roads during this period from 1900 to—well, prior to and during the time of this contract. * * * This contract (Peavey contract) I consider the fairest contract that was ever made between railroad and a shipper, and practically, I guess, the only one in existence at that time. The rest were all fixed up under cover." The compensation named in the contract was reasonable compared with the compensation being paid by all other roads at that time. The contract was based partly on what competitors were getting on competitive lines and partly on what the service would cost.

The CHAIRMAN. Did you at the time consider that it had the effect of giving Peavey & Company an advantage over other buyers?

A. I do not know as I remember what I construed it at the time. I say that I considered it a good thing.

Mr. BALDWIN. Yet you are pressing a claim against the Union Pacific based upon this rebate charge, aren't you?

Mr. JAQUITH. If they legally can pay a rebate to the Omaha Elevator Company, I want my money when I perform the same service.

Q. In other words, you expect to maintain in a court of justice a claim the basis of which you now confess to be a rebate?

A. It is not a rebate to me.

Q. Oh.

A. I paid them that much for the service.

Q. Oh, then there was a service in this. It is not a rebate when it is a service?

A. I paid that much.

Within the last two or three years elevators have been built at or near Omaha by Updyke Grain Company, Nye-Schneider-Fowler Company, Merriam & Holmquist, Cromwell Lumber & Grain Company, Nebraska-Iowa Grain Company, Great Western, Van Dorn Company, and the Drodge Company. So there has been no material effect so far as progress is concerned by the fact that the Union Pacific has been making this allowance. Since June, 1906, the allowance of 1¼ cents has been allowed to all shippers who transfer grain. The Union Pacific grain has since commanded one-half to three-fourths of a cent better price, which benefit goes to the farmer. If all the railroads should make this allowance, it would not be for the benefit of all, because the market is as broad as an elevator outfit will allow it to be. The payment of an elevator charge to elevators only works against the interest of all commission houses, and you can not
143 have a large, broad market unless you have got a number of men who are working for the small trade among the different mills, and at those various places that the elevators skip.

The cleaning of grain could be done at Chicago as well as at Omaha. The only advantage to the Omaha elevator would be the different markets it could reach. There would also be some advantage to the Chicago elevator in regard to markets. The advantages at Omaha would be greater than at Chicago.

There are a number of independent dealers in Nebraska who have no terminal elevators, but the number of those prospering prior to the organization of the Nebraska Grain Dealers' Association was very few. The country elevator operators were not dependent on the terminal elevator. They prospered without the terminal elevator. Had it not been for the contract with the Union Pacific during certain short crop years, Peavey & Company might have seen fit to close up that elevator for a time and save expense.

Q. Did you at any time (while manager of the Omaha Elevator Company) go into the country and buy grain at any local point, paying a larger price than you otherwise would, in order to get the business for the Union Pacific Company?

A. Well, ordinarily a party receiving benefits—or a corporation—from a railroad, they would naturally protect their interests at junction points or common points, and thus pay more for grain than they would otherwise, or keep open some stations that they might close.

In times of rush, cars were held by the Omaha Company over free time. Is practically certain that they did not pay demurrage on these cars.

Mr. MARBLE. Mr. Jaquith, these questions asked you relating to division of the allowance. Did you at that time (when manager of Omaha Elevator Company) make your bids in the country higher because of getting that allowance?

A. Ordinarily, no; and it was only exceptional cases that it ever occurred.

Q. Did it ever occur in exceptional cases?

A. I think so; yes, sir.

Q. What was the exception?

A. Well, I would have to brush up a little.

L. S. GILLETT, president of the Electric Steel Elevator Company, which company is a terminal at Minneapolis:

Receive no allowance from railroad companies delivering grain at that elevator. The grain is handled, mixed, purified, etc., in the elevator. Thinks that any person operating elevators and receiving allowances of 1¼ cents per hundred could use that allowance for the purpose of putting up the price of grain they purchased and put into an elevator so as to monopolize the business as against parties who do not receive such allowances.

Three-fourths of a cent a bushel would be a good fair charge for handling grain. The Electric Steel Company is a terminal proposition entirely. It has no connection with country houses. The elevator is of 2,750,000 capacity, fireproof. The company buys grain on the Minneapolis Exchange exclusively and the dealers deliver it to the elevator, and it is held there. This is true of 90 per cent of the grain. It does some transfer business for other people. Is situated upon three lines—Great Northern, Northern Pacific, and Great Western. If grain is bought located in any elevator not upon those roads, generally speaking it is delivered through the transfer company, which pays the transfer charge.

There is no agreement with any railroad company to unload cars promptly. One-half of a cent a bushel is transfer charge, which includes ten days' storage. Over ten days' storage is charged at one-fourth of a cent for every ten days or fraction thereof, except that from November 10 to May 10 they do not exact more than 4 cents.

If any railroad company entering Minneapolis should grant 1¼ cents transfer charge to all the elevators they might drive the men without elevators to do business without a profit, at least.

L. T. SOWLE, Minneapolis. Commission and elevator business. Built the first terminal at Minneapolis and some country houses in 1885:

144 No allowance is received for unloading grain into the elevator except the charge made for doing work for anyone. Railroads make no allowance. Handles grain in the ordinary way by mixing, cleaning, blending, etc., and derives therefrom a satisfactory profit.

If the elevators were allowed 1¼ cents by the railroad companies for unloading their grain it would affect their competitors in Minneapolis, but not so much as the country elevators. They could make them do business without a profit.

GEO. H. CROSBY, freight traffic manager, Chicago, Burlington & Quincy R. R. Co.:

The Burlington will assume the cost of transferring freight at Kansas City or Omaha. In the case of grain, they transfer it themselves or pay somebody for transferring it. They have not paid anyone since this notice was given out. At Kansas City they have their own facilities and at Omaha they have not had an opportunity. The charge is paid on all grain from a connecting line. It is not a fixed charge, because it can be done for less money at some places than at others. What they pay is practically a transfer from car to car and not into terminal elevators at the end of the haul. The cost of transfer is made where the railroad company calls for transfer. They do not pay a loading-out charge to such an elevator as that of Peavey & Company. This would not include the manipulation of grain, but simply a transfer. The identity of the grain is preserved.

The Burlington formerly paid 1 cent per hundred to Harris & Company at Burlington for transferring grain and releasing equipment. The elevator of Harris & Company was the only elevator at Burlington and would not do it for less. The elevator is not now in operation at Burlington. If it were, they would not pay anything as an allowance.

VOLUME III.—HEARING ON OCTOBER 1, 1906.

GEO. RUPLEY, Duluth, Minn. Engaged in the grain business twenty-one years, during fourteen of which he was manager of terminal elevator at Duluth. Is familiar with the business of country elevators:

Q. Can you state whether or not it is an advantage to a line of country elevators to have in the same territory a terminal elevator at some convenient point; and if so, why?

A. Yes; it is an advantage; there are many reasons why. The principal one is that a terminal elevator receives grain from a number of different localities and can equalize the grades. The line of country elevators which controls a terminal elevator can make up the variation in grades at one station by the very good grades at another station, and if they did not have a terminal elevator they would not have that advantage.

Q. What are the sources of profits in the management of terminal elevators; in what way do you make a profit?

A. Receiving, shipping, and sorting the grain—that is, the grain of other people. Receiving, shipping, sorting, buying, selling, mixing, and improving the quality of their own grain.

The terminal elevator would be best situated at the nearest strategic point to the source of production—that is, the point from which shipments can be made to various markets—for the reason that by having grain stored at some point of this kind they can take advan-

tage of the varying conditions in the various markets and ship to most advantageous markets.

Elevators have a regular warehouse charge for handling grain, but railroads do not pay any allowance for unloading or handling it, and never have in the knowledge of the witness. If parties receiving an allowance from railroads wanted to do so, they could make parties not receiving allowance do business for nothing. Five cents a bushel would be a very high rate of profit on grain. That would be an exorbitant rate. Taking into consideration the sources of revenue which would include country buying, margin, and terminal profit for handling it might run anywhere from 1 cent to 3 cents a
145 bushel in a successful year. If a shipper having a line of elevators and a terminal sorts grain at the terminals, he would have to unload the grain anyway, and it would not necessarily benefit the railroad company to have the cars unloaded.

The expenses of operating elevators are taken out of the gross receipts of the business, and if the railroad company should pay 1¼ cents for operating a terminal elevator it would be receiving increased pay.

Q. It would be paid for twice, would it not, as a matter of fact?

A. Yes.

Retired from the elevator business in 1894. He was with the Lake Superior Elevator Company of Duluth, which became embarrassed, "busted," and was reorganized. Does not think the country line is much more essential to the prosperity and profit of the terminal company than the terminal is to a country line. Has never had experience in handling a line of country elevators independent of a terminal.

The charge was about 1¼ cents per bushel for receiving and shipping, including twenty days' storage. Afterwards there was a rate of one-third of a cent for each thirty days additional. That rate was afterwards reduced to one-half of a cent a bushel for receiving and shipping, including 15 days' storage, and one-half cent for every thirty days additional.

The men who would be affected by the allowance of 1¼ cents by a railroad company would be the men doing the same line of business in the same territory, buying of the same parties and selling in the same market.

Elevators in North Dakota do not build terminals at Fargo and Grand Forks instead of Duluth, because there is no market there and because it would be impracticable to do business at a point which was not a terminal of a railroad because of the trouble in furnishing cars a second time.

C. E. SPENS, general freight agent of the Burlington lines west of Missouri River. Has been in business about fourteen years:

Prior to the establishment of the Omaha Grain Exchange a very small percentage of our grain was billed to Omaha. During the fiscal year ending with June 30, 1904, but 2.4 per cent of the grain

was billed to the Omaha market. During the fiscal year ending June 30, 1905, but 6 per cent was billed to the Omaha market, and for the fiscal year ending June 30, 1906, about 13 per cent.

On our lines west of the Missouri River we loaded, during the fiscal year ending June 30, 1906, about 59,000 carloads of grain, or 60,000,000 bushels, about 46,000 carloads the year before, and 58,000 carloads the year before that. These figures are for Omaha.

During the fiscal year ending June 30, 1906, 40 per cent of our grain originating west of the Missouri River was billed to Missouri River markets; 26½ per cent was billed to all eastern markets, which include Minneapolis, St. Louis, Chicago, the seaboard, and the Gulf; 6 per cent was billed to Colorado; and the balance was local, for feeding and for mills and for miscellaneous destinations.

The year prior to that 32 per cent was billed to Missouri River markets, 30 per cent to eastern markets, 7 per cent to Colorado, and the balance miscellaneous.

The year prior to that only 25 per cent was billed to Missouri River markets, 6 per cent to Colorado, and 49 per cent to eastern markets; the balance miscellaneous.

The following statement shows elevators located at Omaha and their capacities:

146 *List of elevators at Omaha, South Omaha, and Council Bluffs, and capacity; also railroad on which located.*

Elevator.	Railroad.	Capacity.
OMAHA.		*Bushels.*
Nebraska-Iowa Grain Company	Chicago, Burlington & Quincy	125,000
Crowell Lumber & Grain Company	Chicago, St. Paul, Minneapolis & Omaha	125,000
Merriam & Holmquist (2 elevators):		
A	Missouri Pacific	600,000
B	do	125,000
Twamley Son & Company	Union Pacific	40,000
Independent Elevator Company	Chicago Great Western	1,000,000
Nye-Schneider-Fowler Company (under construction).	do	1,000,000
SOUTH OMAHA.		
Updike Grain Company	U. S. yards tracks	500,000
COUNCIL BLUFFS.		
Omaha Elevator Company	Union Pacific	1,500,000
Trans-Mississippi Grain Company	do	500,000
Drodge Bros. Company	Chicago Great Western	50,000
Nebraska Hay & Grain Company	Chicago & North Western Chicago, Burlington & Quincy Chicago, Rock Island & Pacific	25,000
Van Dorn Grain Company	Chicago & North Western Chicago, Burlington & Quincy Chicago, Rock Island & Pacific	50,000
		5,640,000

In addition there are the Chicago, Rock Island & Pacific small transfer elevator and the transfer elevator of C. F. Lefferts, a grand total of 15 houses.

In December, 1903, the freight rates on grain from practically all grain territory west of the Missouri River to the Mississippi River and the East were adjusted on the basis of local rates to and from the Missouri River—that is to say, the through rates were identical

with the sum of the locals. Prior to that the through rates were less than the sum of the locals. There are various factors which enter into the establishment and success of the Omaha grain market; one is its geographical location, and, taking other markets into consideration, one important factor is the adjustment of rates to what we call the break on the river. The Missouri markets can serve other markets as well or better than any other market. The rate from Omaha to St. Paul is 1 cent less than the rate to Chicago and thence to St. Paul, if the grain dealer at Chicago were to purchase grain in Nebraska, bring it to Chicago, elevate it, and reship to St. Paul; and the same is true of Duluth. Can also reach Milwaukee from Omaha better than to Chicago and thence to Milwaukee. Can reach seaboard just as well from Omaha as from Chicago, starting from interior. Missouri markets have an advantage over Chicago also in reaching the principal southern territory.

In 1904 the receipts were 16,000,000 in Omaha and in 1905 thirty-two to thirty-four million. Reports of Omaha Grain Exchange, 1904 and 1905, show receipts and distribution of grain by the different points.

The total equipment for the handling of grain by the railroads entering Omaha is 190,000 cars. The total equipment of the Union Pacific is 8,628 cars.

The following is a statement of equipment of the several railroad companies:

Statement of equipment that can be employed in grain traffic owned by lines serving the Omaha market.

Missouri Pacific Railway	25,688
Chicago, Burlington & Quincy Railroad	26,910
Chicago & North Western Railway	29,702
Illinois Central Railroad	29,157
Chicago, Milwaukee & St. Paul Railway	28,436
Wabash Railroad	9,561
Union Pacific Railroad	8,628
Chicago, Rock Island & Pacific Railway	25,890
Chicago Great Western Railway	6,800
Grand total	190,772

147 Higher prices have been paid for grain when shipped via the Union Pacific than when shipped via the Burlington. On August 16 the Nebraska-Iowa Grain Company, having country elevators and terminals on the Burlington, paid for No. 3 or better corn to the Farmers' Elevator at Dorchester, to J. M. Sewell at Hastings, and to the Spelts Grain Company at David City, 44¼ cents per bushel, while on the same day they purchased the same grade of corn from James Bell & Son at David City, and from John Erickson at Stromburg, paying for the same 44¾ cents per bushel, or a half a cent higher.

Having received a complaint, the dealer was asked why this difference was made, and the reply was that the higher price grain was for shipment via the Union Pacific. Was advised by several grain

dealers that grain arriving to be sold in the Omaha market which carried elevation was of more value and was sold more readily than grain not carrying elevation. Burlington does not pay any allowance. Burlington delivered 7,500 cars in the fiscal year ending June 30, 1906. No allowance was made at any time by the Burlington on grain into Omaha. An allowance was made out of Omaha to meet competition. Every through line was paying elevation. The Union Pacific allowance to Peavey & Company was the basis of competition. On July 1, 1906, the Burlington ceased to pay allowances on its line. A tariff has been published by the Burlington to the effect that they will assume the cost of transfer of grain from car to car to release equipment or to secure elevator weight, which is an operating expense, and does not contemplate any handling or storing of grain. If a car of grain arrives via any other line than the Burlington and the owner refuses to permit that car to go through to a destination on the Burlington; the Burlington will transfer the grain and employ any facility to do that work that is most economical.

An Omaha grain dealer had some 300,000 bushels of grain in his elevator on the Chicago Great Western at Omaha, the bulk of which he would route via the Burlington if they would assume the cost of transfer through the elevator and thus pay an elevation allowance, and it was declined.

The matter of the difference in price paid by the Nebraska-Iowa Grain Company when the grain was to go over the Union Pacific could be equalized if the Burlington would make an allowance for transferring to the Nebraska-Iowa Grain Company at their elevator at Gibson, Nebr., or the Burlington could cut the rate in any other way.

There have been other complaints. At one time during the spring of 1906 all the roads were paying 1¼ cents allowance either in or out of Omaha, which is practically the same. At this time there was a complaint from Haysens Grain Company, who had a line of elevators upon the Burlington, and also had a cleaning house at Table Rock. They complained of discrimination and wanted the Burlington to pay them elevation at Table Rock, Nebr. This complaint was because the allowances were paid only at the Missouri River and not in the interior. Was a matter of location.

Trans-Mississippi Elevator at Council Bluffs was built in 1906. The Van Dorn at Council Bluffs in 1906, the Drodge on the North Western tracks in 1906, the Nebraska-Iowa Grain Company at Gibson in 1904, the Crowell elevator on the Northwestern tracks at Omaha in 1906, the Updyke elevator at South Omaha in 1905, the Chicago Great Western elevator in 1905, the Merriam & Holmquist elevator in 1905.

The difference between the amounts of grain that came into Omaha in 1904 and 1905 was not so much the consumption of
148 grain at Omaha as the facilities for shipping it out of Omaha to distributing points like St. Paul, Minneapolis, Kansas City, St. Louis, and Chicago. Witness attributes the increase in the num-

ber of elevators to the strategic location of Omaha and Kansas City as serving the grain market or the grain territory west of the Missouri. Elevators are a necessity to the market at Omaha. And the transfer of grain is an advantage to the Omaha market.

The Minneapolis market is a wheat market. There is more corn and oats shipped through Omaha than wheat. If corn is shipped from the interior through to the Mississippi River via the Burlington, it does not go through Omaha, but goes through Pacific Junction or Plattsburg. All corn that goes to Omaha is billed flat. All cars delivered at Omaha over the Burlington are released there without the payment of elevation. Witness was not in a position to answer generally, but for two or three days noticed that perhaps conservatively 75 per cent of the cars used by the Union Pacific handling grain was foreign equipment. These cars should be forwarded home over eastern lines.

It is the understanding that all the Missouri River lines except the Union Pacific discontinued making allowances on or about July 1, 1906. It is stated, however, that the Wabash pays 1½ cents per 100 for loading cars. The Union Pacific on June 26 extended the allowance to all elevators at Omaha, South Omaha, Council Bluffs, and Kansas City, the tariff specifying that it was for releasing of equipment. There is more than one rate east of the Missouri River now. One local rate and the other proportional rate. The proportional rate is 10¾ cents on wheat and 9¾ cents on corn to Chicago. The local rate is 15¾ cents and 14¾ cents. The proportional is limited to grain originating west of the Missouri. Knows of no reason why grain should be billed through when the through rate is the sum of the locals. Does not know that any of the roads bill through now. On the Burlington the grain coming from west of the Missouri takes the proportional rate if it is going to a destination where the proportional applies—the Mississippi or east. To do that it must have a certificate that it did come from points west of the Missouri River. When the railroads were paying 1¼ cents on out movements of grain, it was not allowed to Peavey & Company. It costs the Burlington two-fifths of a cent per bushel for transferring grain at their own elevator at Kansas City, based on six months' experience under ordinary conditions. It is purely a transfer house.

During the year ending June 30, 1906, Burlington hauled fifteen or sixteen thousand cars into Kansas City. If they get 25 per cent of what they haul in to haul out they are fortunate.

Burlington has a transfer elevator at Kansas City, and thinks the cost of transferring the grain averages two-fifths of a cent a bushel. Will not say it is absolutely correct. Has other witness who knows.

GEORGE F. POWELL, grain business in St. Louis, Mo., under firm name of Conner Brothers & Company:

Since January 1 has handled 2,000,000 bushels. The St. Louis dealers were suffering very much by finding themselves unable to compete because there was no allowance at St. Louis for elevation

transfer. The effect was to reduce the business very much. Bought grain in territory west of the Missouri River and could not bid as high as those having the allowance. They received an allowance in St. Louis in August, 1905. Then they made two bids, one on the grain that would receive elevation allowance and the other on grain that would not. Allowance was discontinued since July 1, 1906. Is at a disadvantage in buying in competition with buyers in territory on Union Pacific. They buy in the same territory and sell in the same markets. They receive an allowance of three-fourths of a cent a hundred on outgoing grain to the southeast, from the southern lines. Has no elevator. The mills consuming the grain at St. Louis receive no allowance. Are dealers and sellers and use the public elevators at St. Louis. The regular commission on the St. Louis Board of Trade is one-half of a cent for handling corn
149 and oats and 1 cent a bushel for wheat. Would be a very prosperous year if he made an average of 1 cent a bushel on grain. Has no investment of any kind except in having office and amount required to buy grain, which requires considerable investment.

The only difference it would make to the dealers at St. Louis whether they had the extra 1¼ cents' allowance, provided they were on the same standing as their competitors at St. Louis, would be that they would have to check up all expense bills and put in claims with the railroad companies. The man who owned the grain had the privilege of putting it through any elevator he chose, and on the presentation of the inbound expense bill the elevation was allowed to him. The owner paid the elevator for releasing the equipment. Does business on the Missouri Pacific, the Burlington, and Rock Island.

Q. In other words, the fact of an elevation charge at Kansas City and Omaha and along the Missouri River aided the markets of those particular places as against you at St. Louis?

A. As against St. Louis.

Q. One of the reasons was that in order to get the elevation charge or the allowance the grain had to come to the Missouri River point, it had to stop there, and it thereby got upon the market at that place before it was forwarded?

A. I do not know that it had to stop there, but by reason of the elevator allowance they were enabled to force it to stop there.

Q. Whether it did or not, I am assuming that if the elevator allowance was made in good faith it inured to the benefit of Kansas City and Omaha and St. Joe markets, because it required the grain stopping there; that is true?

A. Well, I should say so.

The dealer paid the elevator the regular amount for handling the grain and the railroad company paid him a regular amount of 1¼ cents. This allowance was regularly published in a tariff. Omaha and Kansas City have an advantage over St. Louis in being able to sell to the Minneapolis or St. Paul market.

Regards the elevation allowance as the equivalent of a reduction in the rate to that extent.

The CHAIRMAN. If the through rates from a point of origin to any given destination are fairly adjusted as between the Omaha or Kansas City gateway, on the one hand, and the St. Louis gateway, on the other, then the granting of an allowance at Kansas City and Omaha and refusing it at St. Louis would operate, as you say, to make the rate higher through St. Louis by a cent and a quarter?

A. Yes, sir; I think that is very obvious, that it would influence the movement of grain through Omaha and Kansas City rather than through St. Louis.

Thinks that grain would not receive the allowance at St. Louis that had received an allowance at Omaha, because on one or two occasions the railroads sent back claims and cut out certain cars which they said had passed through an elevator at Omaha and had received the allowance. Bids are so made that, considering transfer charges and trnsportation charges, a profit can be made between the cost price and the selling price.

E. M. F. LEFLANG; in the grain business at Lexington, Nebr., and is also a miller. Lexington is 230 miles west of Omaha on the Union Pacific. Has another elevator at Cozad, operated as Platt Grain Company, about 15 miles west of Lexington, and also has elevator at Willow, 20 miles west. Also has an elevator at Columbus and is building two at Polk and Hordville. Buys about 700,000 bushels a year at two places, St. Joe and Grand Island. Mills wheat and ships corn west. Ships it west because that is the only way they can make anything on it, because conditions are such that they can not compete with the Omaha Elevator Company. Have been in business twenty-one years. Buys grain and stops it in transit at Lexington for the purpose of cleaning it. Then it is loaded into foreign cars that go through to destination. As he is allowed nothing for transfer, it costs a cent and a quarter per hundred pounds more than it does the Omaha Elevator Company.

Operates under the name of the Lexington Mill and Elevation Company. There are two other elevators at Lexington, but the Lexington company gets a large percentage of the business.

150 At Cozad, besides the Platt Grain Company, there are two other firms and the Omaha Elevator Company, but he is "getting along and getting his full proportion of the business."

Q. You made these arrangements with the Union Pacific to build elevators and go into the grain business at those two places (Polk and Hordville on Union Pacific)?

A. Yes, sir.

Q. You did this in view of your past experience and the fact of the allowance at Omaha?

A. That is exactly what we are doing.

Q. You have done this, notwithstanding this allowance at Omaha, making these extensions and getting more all the time?

A. Yes, sir.

Ships on the through rate with the privilege of stopping for cleaning in transit at Lexington. Ships in foreign cars because he does

not like to have grain transferred at Omaha or Council Bluffs. There is some loss in transferring. Has no trouble in getting foreign cars. Flour goes on at the balance of the through rate. Thinks wheat cleaned and mixed is worth 2 cents a bushel more than the grain as it comes from the country. Unloads and reloads about 480 cars a year. Cost of unloading grain into elevator, aside from fixed expenses that must be paid whether unloaded any grain or not, is about 75 cents a car.

Q. If your elevator is also getting an elevator allowance and is also a dealer, and he goes to buy a car of wheat, as against an independent dealer, how much advantage has he got, considering the fact that he has fixed expenses of running his elevator anyway?

A. His profit is about $7.50.

Lexington is 230 miles west of Omaha. Burlington has a line south of Lexington about 12 miles. Between the two lines is grain-growing region. Thinks prices are higher on the Burlington.

A good deal of the grain is sold in Omaha. Dealers who buy the grain in Omaha give directions how to ship it.

Grind about 1,150 barrels of flour a day. The elevator at Cozad is primarily for the purpose of supplying grain for the mill.

A miller enjoys a profit in his milling business and a grain dealer merely buys and sells the grain and must figure his profit on this transaction.

Q. Does not that make competition between the mill and the man who merely buys the wheat to sell it again? That ordinarily makes a higher price and worse competition than any other place for the man who is merely a grain merchant.

A. As I said, the freight rate enters into the matter largely, whatever is paid. The more elevation charges between Lexington and Liverpool the worse it is for the American miller.

Ground at Lexington the previous year about 250,000 bushels of wheat.

GEORGE C. THOMPSON, grain commission business, Omaha. Before he entered the grain business he was employed by the Union Pacific at Omaha in the freight depot. In his commission business he is enabled by the elevator allowance to sell the grain for shippers on the Union Pacific at a higher rate than that of others—one-half to three-fourths of a cent difference per bushel. This grain is consigned to the commission merchants to be sold on the exchange. The grain is entitled to the 1¼ cents allowance. Does not know whether the shippers over the Union Pacific pay more to the farmer. The allowance does not affect his business, but the business of the shippers. This condition has existed since the other roads ceased to pay allowances.

C. F. DAVIS, grain business at Omaha for two and one-half years. Has been in the business elsewhere twenty years. Prior to coming to Omaha was in business in northwest Missouri and western Iowa. Company owns 12 elevators in the country and terminal in Omaha.

Company is the Nebraska-Iowa Grain Company. Rated as 125,000-bushel terminal. Handled about 1,500 cars for the year ending May 1, 1906. Considers terminal elevator necessary to the business, because of advantage in mixing, etc., and in estimating and weighing grain. There are a number of advantages in having a terminal
151 house in connection with a line of country houses. Chief among these advantages is the mixing of low-grade and high-grade wheat to make a uniform test or uniform grade of good merchantable wheat. Another feature is in estimating and weighing grain. Grain sent from country to outside markets has to be sold on the weights of the market in which it is sold, and the Omaha weights are considered better, because it relieves the shipper from standing expense of shrinkage. If have official weights in Omaha, enables shipper to better settle differences, whereas if only had country weights they are not reliable. Has paid more for grain shipped over Union Pacific than grain shipped over other lines. Has been receiving the allowance at his elevator since June, 1906. Gets no allowance from other elevators. Formerly received allowance from other roads when grain went out. There is no difference in the service performed when the allowance is made; the grain is unloaded just the same. Has been familiar with operation of terminal only two years. Burlington and Union Pacific are competing lines, and grain in competition would be a considerable proportion of the grain over the State.

Has promise of allowance from the Union Pacific, but as yet has had nothing from them. Has been manager of the company since July 15, 1906. Had some experience before in the same company. First experience with terminal elevator has been last few months. Commenced bidding higher at David City August 11, 1906, and continued seven days, after which Mr. Spens, of the Burlington, called him up. Up to August 10 had a cut rate and shipped all the grain he could buy. On August 11 the elevator was without business practically and raised the bid to get grain to do business with. The Union Pacific grain was worth more than Burlington grain, so he raised the price on that. Bought, perhaps, forty to fifty thousand bushels at the increased price. Has made several purchases of grain on the Union Pacific at higher prices than on the Burlington. Is inclined to think elevator allowance gives farmer more for his grain.

The CHAIRMAN. Now, if this allowance by the Union Pacific operates to give the producer more for his grain, why is it not a good thing?

A. Well, possibly it is.

Q. Why would it not be a good thing if all made the allowance?

A. That might be true, too.

In July Burlington put in a cut rate, and when that rate was discontinued the price of grain to shippers was reduced accordingly.

The elevator allowance is a slight advantage to the Omaha elevator in that it protects the Omaha elevator man in bidding in Nebraska, which is a little higher possibly than Chicago or St. Louis markets

can pay for that grain, while if it were a cut rate St. Louis and Chicago would bid as high as he could and he would receive nothing for handling the grain through his elevators. Experience is short in the grain business, and don't know that his opinion is worth much, "but it certainly places our little company at a disadvantage to have any other elevator in Omaha receive 1¼ cents a hundred on their line of grain off the Union Pacific road, owing to the fact—we will take the specific case in the question of the Omaha Elevator Company. They have something like 70 elevators on the Union Pacific road and bid all the roads in Nebraska, as I understand it. After their grain has arrived in Council Bluffs and is unloaded in their terminal house, I should say that 80 per cent of it has paid 1¼ cents unloading charge. After all the grain that I buy at my 10 country stations and the grain that I buy from dealers on all the roads in Nebraska—after my grain gets to my terminal house and is unloaded there is 20 per cent of it has come off the Union Pacific road and on which I have received 1¼ cents a hundred. In other words, an elevator situated as the Omaha elevator is at this time owns their grain about 1 cent per hundred cheaper than I own mine. We buy in the same territory in competition and we sell in the same market in competition. The inference is plain." If the Chicago elevator were paid the same allowance the advantage would disappear.

152 WILLIAM H. SUFFERN, in grain and corn business at Decatur, Ill., and desires to be heard before the commission. Has country elevators on the Illinois Central and Wabash. Grinds 10,000 bushels of corn per day of twenty-four hours. Found that the granting of allowances on corn drove him out of the export corn business. I export corn via New Orleans. The allowances that I have referred to were made, upon my best information, to Harris, Scoten & Company, at Chicago, who had elevator D leased from the Central Elevator Company of New Orleans, which I am informed is a company in which the Illinois Central officials are interested, and the West Wego elevator, which is the Frisco elevator at New Orleans, which was leased to the J. Rosenbaum Grain Company, of Chicago. I was informed that the Illinois Central rate was 12 cents a hundred pounds to New Orleans; that was the published tariff rate to New Orleans for export, which included the fobbing charge and fifteen days' storage in the elevator. And I was informed that 2 cents of that went to the company who had the elevator leased, the export elevator, and 10 cents of it went to the railroad company. I was unable to compete with the handicap of the elevation charge of 2 cents a hundred pounds in European markets and in fobbing grain, putting it on the vessel at New Orleans. I was informed that anybody down there who was outside of the elevator lease was unable to do the business. I know that grain was confined to those two firms who had these elevators.

The elevation charge on the Ohio River shuts out everybody who does not receive the elevation charge of three-fourths of a cent a

hundred pounds. Attempted to do business via the Ohio River gateway at Cairo and was unable to compete.

Q. Will you state whether, in your opinion, country elevators or a line of country elevators that has no connection with a terminal receiving such an allowance can do business in opposition to a line having a terminal with an allowance?

A. If they would cultivate the friendship of the line house which has the allowance, they can; otherwise they can not. I mean that you must be on a friendly basis with the line house; that you are handicapped to the extent of the elevation, and if you undertake to force things in a business way you are in their power, and they could simply put you out of business.

There was no charge to the shipper for loading grain through the elevator into ships at New Orleans, but a dealer in grain leased an elevator and was paid 2 cents for all grain that went through. This year the conditions have been changed so that all shippers will be treated alike. Witness expects to go back into the business. Considers 1 cent a hundred a reasonable charge for receiving and shipping grain from an elevator, including fifteen to twenty days storage. When an elevator is operated as these are they do nothing but elevate the grain and load it out; do not clean it; do not grade it; if they dry it, they charge for that.

There would be no objection to a charge of a cent a hundred pounds, provided the work was done by a strictly public house, and everybody was placed upon the same basis, and the elevator did not deal in grain at the same time.

Began grinding corn eight years ago and made three increases since that time. Began corn export business about eight years ago in a small, conservative way, because they were not familiar with the business. This business increased until he ran up against the allowance proposition, which was three or four years ago.

At New Orleans there is a difference in color of grade No. 3 of corn which amounts to about 1 cent a bushel, and in shipping through the elevator of a rival anyone shipping in the best corn might get corn worth 1 cent a bushel less.

J. C. LINCOLN, commissioner of the Merchants' Exchange Traffic Bureau of St. Louis since May 1, 1906:

Formerly with the Missouri Pacific as assistant freight traffic manager. Had been working for a railroad since 1876.

The first public appearance of the allowance was in connection with the allowance made by the Union Pacific to Peavey &
153 Company under what is known as "the Peavey contract." That allowance was made at Omaha and Kansas City. The railroads operating in the West, with the exception of the Union Pacific, were not making elevator allowances. Some of the lines were, so it is believed, making an allowance without publication shortly after the Peavey contract became public property. The ele-

vator allowances were made public by all lines, about 1903, and were made to the elevator interests either as an unloading charge or as a loading charge for the purpose of meeting the allowance made by the Union Pacific, and originally were confined practically to the elevators operated by line operators. So far as elevator allowance made by the Union Pacific was concerned, the effect was not felt directly by the railroads in competition, because in bidding for grain in the country the allowance was not used.

When competitive conditions became keen, the operators of line elevators on the other roads claimed that in order to be placed on a parity with the operators on the Union Pacific they should have the benefit of the allowance. Later came the demand for allowance at other points. Can not see that Peavey & Company perform any different service than other elevators receiving grain, or any consignee handling grain or any other commodity.

This allowance makes a discrimination between localities such as Chicago and St. Louis on the one hand and Omaha and Kansas City on the other hand. When the allowance was made at St. Louis, the business of that city increased, because the dealers could then compete with the dealers at Omaha and Kansas City.

Cars are not unloaded any more rapidly when the allowance is made than before.

I think the shipper should bear the cost of transferring his own grain through his own house, and the shipper should bear the cost of unloading the grain; the receivers, when it gets to destination, and shipments * * * as through shipments, when they arrive at junction point with the connecting line, the road originating that and not desiring to let their car go through, then the carrier should provide for some means of transferring that car, and it should be at the expense of the carrier. This has been necessary since the instigation of the railroad and grain business. Take a shipment originating on Union Pacific and coming to Kansas City and then over the Chicago & Alton sent through to Chicago, the Union Pacific has a right to demand and wants its own equipment back at Kansas City and the carrier should pay for the transfer of that grain.

The CHAIRMAN. Pardon me. He means not a service to the shipper. There is no service performed to the shipper, but to the carrier.

Mr. HAGERMAN. I am dealing with the abstract question that there was a service.

Mr. LINCOLN. Certainly, and the carrier should perform that service.

Mr. HAGERMAN. That service ought to be performed by the railroad company?

Mr. LINCOLN. That through service; yes, sir.

"If there is no connection between the owner of the grain and the party to whom the allowance is given for the transfer it would not cut any figure and the roads themselves would have that done as cheaply as possible."

Witness is of opinion that the transfer at Omaha and Kansas City is necessary both to the railroad company and to the benefit of the grain business, which thereby affected the price of the grain; the objection would not stand if the allowance were paid on through shipments, as it should be, and not paid as an unloading charge. Claims that the owner of grain should not be allowed a compensation for unloading it at his elevator when that property has reached its destination and is to be resold and distributed somewhere else.

The CHAIRMAN. If that grain comes into Omaha, coming there to be consigned to any destination other than Omaha,
154 so far as the origin of this shipment is concerned, it is a terminal point and the duty would be upon the consignee to handle his own grain?

A. Exactly.

The CHAIRMAN. And the carrier would have no right, therefore, to pay for the cost of unloading that grain to the shipper?

A. Absolutely none, in my opinion. There are a great many, aye, thousands of farmers' elevators in Kansas and Nebraska. Can not say that when he was with Missouri Pacific he received any complaints from farmers' elevators. Received very few complaints from inland towns. Received complaints from the Hall-Baker Grain Company, from milling interests, and from men originating grain out near Little Rock, and from St. Louis grain men.

Not trying to hold out that the equipment should not be released and for the reason they have the grain transferred; if the conditions are such that in accepting that property they will have to transfer it, they should pay for it. Found out while with Missouri Pacific that transfer facilities were necessary at Kansas City and all terminal points for handling freight. Found that all lines had to provide transfer facilities for handling. It was necessary for the Missouri Pacific to have transfer facilities for the prompt handling of business and the release of cars, on through business. After destruction of Merchants' elevator at Kansas City, had the shovel method from car to car and found there was absolutely a loss of grain, a delay to cars, and great deal of dissatisfaction about the transfer of property in periods of congestion. It was inadequate and unsatisfactory also in release of equipment. Consequences of using a small transfer (shovel method) made it expensive because of detention of cars and loss of grain. There is a detention of cars at certain times when you employ the shovel transfer that might make your equipment more valuable.

The payment of the allowance would result in the farmer receiving a higher price for his grain, but the consumer would in the end have to pay the extra price.

If the allowance was made by all the railroads to all elevators, there would be no discrimination between elevators "but it would be the rankest kind of discrimination against the man who does not own and operate an elevator and against a miller who performs the

same service, and who does not get a compensation for it; that is my opinion."

The Missouri Pacific is the second or third largest carrier of grain into Kansas City. Practically all the grain is local. There is very little through grain. Through grain on the Missouri Pacific does not pass through Kansas City. Thinks it would be unnecessary for the railroads to pay elevators for unloading grain, because it would be unloaded anyway. Railways have built elevators at Kansas City through the necessity of competition. They build them when they can not get some one else to build them.

Q. Now, in regard to building up these elevators that have been put in at Kansas City by the different roads; you say that that was forced upon the railway companies as a matter of competition?

Kansas City being a market, too, the roads began to compete for the business that came into that market town, and unless elevator facilities were provided by the different shippers who handled grain to that market, in order to handle it not as a transfer proposition, but as a grain proposition, the different roads competing for the business were forced to put up these elevators?

A. Absolutely no question about it.

If those elevators had been erected as a mere transfer proposition, they would not have been of the same construction and not so large. A transfer house can be handled much more economically than elevators. Is informed that the transfer charge at St. Louis is a half a cent a bushel where they do not have to hold any grain.

At the Missouri River they have abolished the elevator allowances, but they will allow one-half cent a hundred on through shipments of grain when necessary to transfer from one car to another, which is published in a tariff.

155 The strong lines on a railroad controlled the trade and got the business for the railroad. That practice does not continue now. They like to do business with one railroad, like to assemble their grain from one railroad, and the economic operation along one railroad for the purpose of inspection, auditing, etc.

Q. And the strong reason for building along one line of road to the exclusion of all others was the rebate concession; is that your idea?

A. Yes; owing to those concessions, special allowances.

JOHN J. STREAM, grain business in Chicago:

Has three terminal elevators of capacity of 4,500,000 bushels—South Chicago elevators C, D, and C annex, located on the Rock Island, Baltimore & Ohio, and Lake Shore. In this business for three years. Handles about 15,000,000 or 20,000,000 bushels a year. Allowance at Omaha operates to his detriment in this way: "I am buying, or trying to buy, grain in Nebraska on all lines. I am offering that same grain to the consuming territory in the East. The grain that I buy in Nebraska is transferred and reconsigned to Chicago. The gentlemen who have this 1¼-cent allowance also buy grain in

Nebraska and they compete with me in the East. They have that advantage over me at all times." A cent a bushel is a very large margin. Is receiving no allowance. A car-to-car transfer charge in Chicago is one-fourth of a cent a bushel. There have been cases where double allowances were made on grain originating west of the Missouri River, but the Great Western reduced the rate to meet that. Grain markets on the Missouri River have advantage over Chicago, in that they can reach markets in the South, North, or West, according to which is the best. Chicago has the advantage of a large local consumption. Without the allowance would consider he was on a parity with the Missouri River market in reaching the eastern market. The effect of these allowances are that they permit the Missouri River grain dealer, or whoever gets the allowance, to undersell the Chicago dealer in the eastern market.

Has been in business about twenty-five years. The company is operated under the name of the South Chicago Elevator Company, none of the stock of which is owned by a railroad. Has no country elevators. The elevators are leased from the Chicago & Rock Island Elevator Company. Although president of the company, knows nothing of the leasing of the elevators.

The effect of the elevator allowance is that Peavey & Company are able to bid more in the West and undersell in the East. Has information from his representative in Omaha, put there recently, that Peavey & Company have been bidding more for grain on the line of the Union Pacific than for other elevator business. If Peavey & Company were to overbid in the fields, it would drive out the terminal men, but not the local men, because Peavey & Company buy of the local man. Can not say what effect it would have upon country elevators. Thinks 1 cent would be a good profit for handling grain. Peavey & Company do not get allowance of 1¼ cents at Chicago.

Has the grain which is purchased for him in Nebraska transferred through the Rock Island elevator at Council Bluffs, which is operated by the railroad. This service has been rendered free since September 1, 1906. Some of his grain was transferred by the Van Dorn Elevator Company because the Omaha Grain Exchange refused to inspect or issue certificates of weight on grain going through the Rock Island elevator. The Omaha Grain Exchange afterwards withdrew the privilege of having the grain inspected in the Van Dorn elevator, so he now uses his own certificates of inspection and weight.

As the elevators of the South Chicago Elevator Company are situated on the Rock Island, if the grain enters Chicago on any other than the Rock Island it would necessitate the payment of a switching charge, so all grain which comes into Omaha over other lines than the Rock Island is transferred to that company. The free transfer is open to all shippers who ship over that line. The identity of the grain is preserved. The Chicago Great Western and the North Western absorb the switching charge at Chicago, but delivery is so uncertain that the grain can not be properly handled at all times. In

buying grain in Nebraska, deals with the local grain dealer, not with the farmer or producer. Sometimes buys from the Omaha dealer. These purchases are in competition with the Omaha Elevator Company.

156 Counselman incorporated the South Chicago Elevator Company in the sum of $665,000 and built these elevators. He owned practically all the stock. Upon his death the South Chicago Elevator Company sold the elevators to the Chicago & Rock Island Elevator Company, who leased them to the South Chicago Elevator Company. The $700,000 received for the elevators was turned over to the estate of Counselman, and the South Chicago Elevator Company continued under the capitalization of $665,000.

Has transferred grain through his elevator for one-fourth of a cent a bushel. The most of it was a year and a half previous to the hearing. Now does very little when elevators of Baltimore & Ohio and Lake Shore are crowded. This rate of one-fourth of a cent was established by the eastern roads. The regular public elevators charge three-fourths of a cent a bushel with ten days' storage, which is the maximum charge allowed by law. Transfer can not be made through public house. Therefore the transferring is done through private houses. Three-fourths of a cent is a mere paper rate and the business is done for one-fourth of a cent a bushel. In the public elevator it is not a car-to-car transfer; the identity of the grain is not preserved; grain goes into a bin and an equivalent amount of grain of a similar grade is sent out. In buying grain one-fourth, or even one-eighth, of a cent a bushel higher bid would get the grain.

Q. You are doing business in competition with the Omaha Elevator Company?

A. Yes, sir.

Q. If they have $600,000 invested in their terminal houses and country houses, through which and by means of which they are doing this business, and it should turn out that you have the use of a plant to do your business worth $1,000,000, in which you have no money invested and for which you pay no rent, that would give you quite a decided advantage over them, would it not?

A. Yes, sir; that is possible.

I understand that the Omaha dealers have boycotted the Rock Island because of the Rock Island putting in some rates to Memphis, via Kansas City, from southern Nebraska, which, as I understand, is the natural outlet for Memphis, and Kansas City is the gateway, and Omaha claims it is not fair to Omaha to deprive them of the trade of that territory. The Omaha exchange will not grade grain of witness. Omaha Grain Exchange inspect only the grain for members. Witness is not a member, but has made application for his manager.

S. McMURRAY, Wood River, Nebr.:

Buyer of grain; in this business about fourteen years. Worked for the Omaha Elevator Company eleven years as agent at Wood River.

Omaha Elevator Company had two elevators there at that time and witness could not get along with the other agent and resigned. Went into business for himself, and when he started to buy grain wheat went up 5 cents and corn and oats 2 cents. The price went up at only Wood River, but not in the surrounding places that I know of. Mr. Peck, manager of the Omaha company, tried to get him to go back, and Mr. Paterson, auditor of the Omaha company, said that if witness bought grain they would "break his back."

Q. Do you know what he said?

A. Said they would be forced to buck me. When I left I guess we were pretty good friends. Most of the grain witness has bought he has had to hold in the warehouse until the market went up. At Shelton, which is a station 8 miles west of Wood River, wheat last year was 5 cents less than it was at Wood River. Shelton merchants wanted him to come up there and buy grain and witness took the matter up with the assistant general freight agent of the Union Pacific, Mr. Lane, but he would not agree to furnish cars at Shelton. This year he was promised cars, so went to Shelton part of the time. When he was at Shelton the market was higher there, and when he was at Wood River the market was higher there. Sells his grain to the Exchange Grain Company of Omaha. During the first five weeks of his business he could not get any cars and during that time the Omaha Elevator Company got 42 cars. After he began getting cars, it was easier to get them going west than east.

157 At another time waited three weeks and could not get cars, while other elevators at the same place received 31 cars. During this time one foreign empty car, Cotton Belt car, was shipped out empty.

Has a claim in for a site on the right of way of the Union Pacific for building an elevator. One of his warehouses, a flat warehouse, is on the right of way, but this is not an elevator and the shovel and broom method of loading is used. Thinks the entire expense of running an elevator at Wood River would be covered by 1¼ cents allowance. Is brother-in-law of Mr. Jacquith, who was also formerly with the Omaha Elevator Company, but quit.

Formerly a Mr. Mitchell owned an elevator at Wood River, but in a year or two the Omaha Elevator Company had trouble with him and crowded him out and he sold to George S. Clayton, with whom the Omaha Elevator Company also had trouble, and built another elevator and "we played two pluck one until he sold out." During all this time Mr. Hoard had an elevator at Wood River, which was in operation all the time. It was not commonly known that both of these elevators belonged to the Omaha Elevator Company. Witness was agent for one of these elevators, and when he started in Mr. Mitchell, being an old resident, got most of the business, and so had to do something to get even. Situation would now be harmonious if witness was not there. Thinks about 80 per cent of cars furnished him are foreign cars. Westbound stuff is mostly Union Pacific cars.

P. K. WINTHER, in grain business at Eustis, Nebr., on the Chicago, Burlington & Quincy:

The nearest point on the Union Pacific to Eustis is Cozad. Was at first engaged in business at Calloway, where he bought grain as a track buyer. Did not have an elevator. Omaha Elevator Company has an elevator at Calloway. Was unable to do profitable business at Calloway. While he was buying grain at Calloway the market price was always a little higher than at the surrounding towns.

Now has an elevator at Eustis with a capacity of 12,000 bushels. Last year bought about 125,000 bushels. Sold some at Kansas City, and some at Omaha, and some to mills. Received no elevator allowance. Cost of running elevator is about $5 per day, including rent. Elevator allowance, if he had it, would pay two-thirds of the cost of running the elevator. Omaha Elevator Company have elevator at Cozad. Expects the price is always a little higher than at Eustis. Cozad is about 15 miles off. The grain between Cozad and Eustis is about divided between the two towns. The grain would go to Cozad but for the fact that there is a better road to Eustis.

WILLIAM S. WARREN, commission business in Chicago:

There are not over 20 or 25 commission men who have no elevators in Chicago. Fifteen or twenty years ago there were from 150 to 200 commission men. Accounts for it in this way: The favors granted to elevator concerns have eliminated the consigning business. Only knows about allowances by hearsay. Now buys grain only in Iowa. Formerly operated about 70 stations in Kansas and Nebraska. Has never been intimately connected with the management of that part of the business, but sold out that part of the business because it ceased to be profitable, because other people were getting rates that they were not. Does not know in what form. Allowances acted to their disadvantage in buying. Dealers receiving allowance have no advantage over witness in selling that he knows of. These allowances are a disadvantage to Chicago as compared with points on the Missouri River. Points on the Missouri River had some advantages other than the allowance. Sold the plant for operating in Kansas and Nebraska five years previous, and knows nothing of the conditions at the time of this testimony.

158 E. O. MOFFAT, has been in the grain business about sixteen years at Kansas City:

Business handled in each year ranged from 500,000 to 2,000,000 or 3,000,000 bushels. Has no elevator, but operates through elevators of other grain dealers. Had received several hundred cars a year over the Union Pacific. Up to June 27, 1906, had made no claim for the allowance for releasing their cars. Has never received any money yet. It was understood that this allowance was confined to Peavey & Company. Has a statement of part of the cars that have been handled over the Union Pacific since the tariff was issued in June,

1906, granting the allowance privilege to other elevators than Peavey & Company. Stopped making out statements because there were no payments being made. Presented claim to G. M. Curtis, agent of the Union Pacific. After three weeks he called up the agent and was told that the claim had been forwarded to Omaha and he would hear from them in due course. After addressing communications to the officers no reply was ever received. The claim was presented to the Union Pacific six weeks previous to the hearing. No objection was made to the claim on the ground that witness was not an elevator man. Understands other grain buyers similar to himself have filed claims which are in process of adjustment.

Grain entering Kansas City is considered a terminal proposition, no matter whether it originates on the Union Pacific or any through line. Eastern lines are making transfer without charge to the shipper, provided the grain goes over their line.

During the time that Peavey & Company were receiving the allowance and other elevators were not, generally speaking, grain over the Union Pacific was commanding a higher price on the Kansas City Board of Trade. There were times when it did not.

Q. Whenever Peavey is on the floor, that condition obtains uniformly, doesn't it; when he is on the floor as a buyer?

A. When he is buying grain; yes, sir.

Peavey & Company has always been willing to sell to witness. At times has purchased grain from Peavey & Company, and has bid for their grain when others have made the same bid, and he has got it by offering to allow the grain to go through their elevator. When a car is set at an elevator there is no more promptness at the Peavy elevator than at any other. At certain times the other elevators do the service as quickly as Peavey.

Would say that car-to-car transfer at Kansas City would be worth one-half cent a hundred. It would be an advantage to the market at Kansas City to have storage furnished for grain. Storage of grain might be worth one-half cent more. Has his cars transferred on the Burlington, Wabash, and Santa Fe; the last few months mostly on the Santa Fe. These railroads transfer free except the Frisco, which charges either half a cent a hundred or half a cent a bushel. It is an unreasonable charge. Thinks roads ought to be required to make transfer without cost to owner. Under the circular, the claim of witness above mentioned is based on the fact that the grain came over the Union Pacific, even though he paid no charge for transferring it. Santa Fe does its own transferring in its own elevator, as does the Burlington. The Santa Fe elevator is one of about a million bushels' capacity. The Burlington is a very small one, which has no storage capacity.

The Burlington is constructing an elevator of about a million bushels. Rock Island also transfers without charge to the shipper, through an elevator which may belong to Rosenbaum, with a capacity of 1,000,000 bushels. Wabash has an elevator of 150,000 bushels, which answers all their requirements. Chicago & Alton has an

elevator of about 150,000 bushels; Milwaukee & St. Paul of about a million bushels; Chicago Great Western of about 500,000 bushels, which they are talking of enlarging. Frisco has an elevator of half a million capacity. Missouri Pacific has an elevator of a million bushels' capacity. Railroads had to have elevators or get some one else to transfer.

159 Private elevators charge one-fourth of a cent, three-eighths of a cent, and sometimes three-fourths of a cent for car-to-car transfer, not including storage. Other railroad companies at one time paid the allowance in addition to doing the service. They have discontinued entirely.

Objection is not to the allowance so much as to the allowance to one firm only. If everybody was permitted to render the service, thinks allowance would be good thing. Considers that the Peavey elevator is not for the purpose of transferring, but for storage.

There is a reconsignment charge made by through lines when grain which comes in over their line goes out over the line of another carrier.

The allowance for transfer on a through shipment would not affect the market, but if it were consigned to a terminal market the elevation allowance would benefit the market. Thinks the railroad should pay when the grain is transferred from one road to another in a through shipment.

Q. Suppose the grain is stopped and delivered there to consignee, who puts it in his elevator and treats it for the market and has an original profit in view; then when shipped out should the railroad pay the loading?

A. As a strictly business proposition, I should say "No."

Although witness has paid at times prices higher than others on the market were paying, he has never paid as much as he might have had he been receiving the 1¼ cents allowance.

On the grain on which claim was made for the allowance the understanding of Mr. Moffatt is "that the elevator that has done the work will do that work in order to get the shipment out. They will do that free. And the fact that the Union Pacific offered this 1¼ cents as a bonus to anyone who would get their cars back to them within forty-eight hours entitles me to it, because I paid more for the grain," when it came in over the Union Pacific, thinking that he would get the allowance.

JOHN KELLEY, flour miller at Kansas City about seven years; prior to that engaged in business at Leavenworth about twenty years:

Capacity of the mill is about 2,000 barrels per day. In connection with the business has elevator of about 350,000 bushels, with an unloading capacity of about 40 cars per day. Has never received any allowance from Union Pacific or any other railway company for releasing equipment. No allowance to his knowledge has ever been allowed to millers at Kansas City. The fact that allowances are made to certain grain shippers and not to millers has operated to the great

disadvantage of millers at Kansas City. If the allowance is made, it inures to the benefit of a miller somewhere. He is able to get his grain cheaper. The prices both on the floor of the Kansas City Board of Trade and in the country are higher on the Union Pacific because of the advantage to Peavey & Company. Formerly did a large business on the Union Pacific, but on account of the allowance the business has dwindled down until the business is now very small.

Bought some grain of a party in the country on the Union Pacific lines and could not get cars to have it shipped in over the Union Pacific, over which route the owner preferred to ship it, but did obtain cars from the Santa Fe. Elevator is situated at East Kansas City, having switching connections with the Suburban Belt, which connects with the Union Pacific Transfer. Union Pacific makes a charge for switching cars to the elevator, although there is direct switch connection. If a car was set in early in the morning of to-day, it would probably reach our mill this evening. It would be unloaded to-morrow morning, and then be ready for switching out to-morrow the empties, so that it would be returned to the railroad within forty-eight hours if the railroads did their duty bringing it in and taking it out. The same service is performed as at the transfer
160 elevators, and so far as the release of equipment of the Union Pacific is concerned the same benefit accrues, although the grain is ground into flour before it is forwarded. The elevator was built for the purpose of doing an export grain business in connection with the flour business, but it was impossible to compete with the favored shippers and the grain business was not carried on. Has no milling-in-transit privilege. Has never received an allowance from any railroad company.

"The switching is added to the through rate. In other words, they claim if it was not for absorbing the terminals the rate would be less than it actually is, on account of the terminals they absorb into the through rate." Has had no more disadvantages since prior to July, at which time the other lines ceased to pay allowances. This disadvantage is not confined to the Union Pacific, but exists in regard to business on all the roads. However, has been put to more disadvantages over the Union Pacific than over other roads.

Might possibly have been able to carry on the grain business if his elevator had been on a main line. Built his elevator in 1898. Found he could not do grain business about January, 1900. Since 1900 has increased the capacity of his milling business 150,000 bushels. Thinks all would be placed on a parity if the allowance for transfer were eliminated altogether.

GUY CHASE, St. Paul, employed in the office of Mr. Severance, attorney for the Chicago Great Western:

Made examinations of entries in book of the Omaha Elevator Company marked "Billing Book O," produced by Mr. Peck, general manager of the Omaha Elevator Company. Purports to be entries of car numbers and initials, but are not complete. Book shows date

of receipt of cars of different kinds of grain, the initials of the cars, and numbers; the date unloaded; the date of the bill of lading; date the bill of lading was received; the consignor; the station and progressive number; the freight paid and the weight; but does not show weight of shipments out, nor, except in a few instances, the car initials out. Shows what purport to be car numbers out, but does not show weights or destination. Dates of shipments out are very much mixed up; not in consecutive order. It is not possible to make a check and determine the cars coming in that were used in shipping out. The following is a statement made up from the book by Mr. Chase, which is included in the testimony in which he has put Union Pacific cars received in one column and foreign cars in another column.

Data taken from billing book "O" of the Omaha Grain Company, covering the period from July 5, 1905, to July 5, 1906.

	Cars of grain received.			
	Total number of cars received.	U. P., S. P., O. S. L., and O. R. & N.	All others.	Cars of which no initials were given in the book
Corn	4,949	1,539	3,392	15
Oats	1,447	487	959	1
Wheat	1,390	687	710	2
Rye	87	36	51	.....
Barley	84	38	46	.....
Grain transferred	27	10	17	.....
Total	7,984	2,788	5,175	21
Percentages	100	34.91	64.82	0.27

H. GOWER, freight traffic manager Rock Island road:

Since the former decision of the Commission, the Rock Island made a contract with J. Rosenbaum for the construction and operation of an elevator at Kansas City. Made in July, 1904. Rock Island pays Rosenbaum 1¼ cents a hundred for transfer of grain of that company and $3.50 on other grain transferred at request of Rock Island. Contract was forced upon the Rock Island by competition. Could not get anyone to build elevator unless allowance was paid. Rosenbaum occupies a position on the Rock Island similar to that of Peavey & Company on the Union Pacific, having country elevators. This contract remained in force until July, 1906. Grain is now transferred through the elevator when desired at $3.50 per car. Under this contract the land was furnished by the Rock Island; the elevator was built by Rosenbaum, and the Rock Island afterwards paid the cost and $5,000 for his services, the elevator belonging to the Rock Island and leased to Rosenbaum. Rosenbaum is a grain and live-stock dealer. Has elevators also at Chicago. Rock Island also has contracts with Rosenbaum regarding business at Chicago. Reaffirms testimony in former hearing that Rock Island did not care to build its own elevators.

161

The contract reads, "In consideration of prompt release of equipment," etc. The contract is in operation to-day as it is written, except that the Rock Island does not pay anything for elevation, only for transfer. This change was by oral understanding between Mr. Biddle and the Rosenbaum Grain Company. Before the erection of the elevator mentioned in the contract, the Rock Island had a small elevator at Kansas City of about 40,000 bushels.

The elevator was built because of the necessity of the Rock Island to compete with everybody.

Q. Well, particularly with them (Peavey), because they were getting this 1¼ allowance; that is true?

A. The necessity was that we had to have elevator capacity to handle the business whether Peavey was there or not. We had to have an elevator there to do the business.

Q. You had been doing business a long time without that elevator?

A. Yes; but at a disadvantage all the time.

Q. The necessity for this 1¼ cents allowance was the fact that it was given by the Union Pacific?

A. That was what the parties put to us—that they could not build and operate an elevator unless they had this 1¼ cents.

Q. Because these other people were getting it?

A. That was their argument.

Mr. BALDWIN. I understood you to say that you testified positively that you had to have these elevator facilities and transfer facilities at Kansas City. The only talk about the Peavey allowance of 1¼ cents in your whole testimony, where you testified that your agent down there had written that the parties making the proposition of building an elevator wanted 1¼ cents because Peavey & Company had it in their contract. I am asking you if that is not the true fact about it.

A. Our necessities were for an elevator in the first place. We wanted an elevator there. The necessity for the elevator per se was on account of the other roads having elevators. The necessity for making a contract paying 1¼ cents was on account of other roads paying 1¼ cents.

Q. The price paid had nothing to do with the question of the allowance being necessary?

A. If the Union Pacific had no contract they would require an elevator.

Q. You mean your necessity for an elevator there was occasioned by the fact that other railroads had elevaters at their terminals to the owners or proprietors of which these allowances were made?

A. Yes, sir.

Q. That was the condition that made it necessary for you to have one; is that what you mean?

A. I do not mean it was entirely for the sake of paying 1¼ cents. I mean to say we needed an elevator, the same as freight cars, to take care of that grain. That was the first thing.

When in need of elevator facilities at Kansas City, Rock Island negotiated with parties to build an elevator, but was unable to get this unless 1¼ cents was paid for elevation in order that they might compete with Peavey & Company.

The old elevator was sufficient for transfer purposes from car to car. This elevator could transfer from 25 to 40 cars a day. Rosenbaum built the elevator and was to be paid for it by the Rock Island by allowing them 15 per cent of the freight bills. If they did not ship over the Rock Island they would not get their money back.

162 E. J. McVann, Omaha, Nebr., secretary of the Omaha Grain Exchange:

Grain exchange organized on February 1, 1904, prior to which there was no grain market at Omaha. There are about 165 members of the exchange, of which 30 or 35 are actively engaged in the grain business on the floor. From September 1, 1905, to September 1, 1906, there was inspected by the Omaha exchange, in 23,111 cars, out 9,824, and weighed in 16,129 and weighed out 10,576. Price of grain in Omaha is based on the highest market to which grain is shipped. Has made up statement of the highest and lowest prices during months from January to August at Omaha. Has also secured from the Chicago Board of Trade the high and low prices for the same period on that exchange. The grain at Omaha is made up for different grades, while the grain at Chicago is "contract grade" only.

Trades on the exchange run up sometimes to two or three million bushels a day.

Because the Rock Island put in a rate to Memphis which was less than the proportional through Omaha from Kansas City and allowed an elevator allowance at Kansas City and not at Omaha, the exchange notified its members of the circumstances; but no obligation was placed on the members to boycott the Rock Island. Mr. Stream was not discriminated against because he shipped over the Rock Island and was not refused membership, as stated by him. His application is now before the exchange.

T. J. Brodnax, Kansas City, grain business, receiving and shipping grain, commission dealer, leases an elevator.

There are several elevators operated by elevator (railroad) companies that handle grain through the elevators free of charge, and these railroad companies do not allow, or will not allow, the private house the amount that it costs to operate these houses. In other words, we have property there and can not do business through our own elevators. When we do business over through roads we have to handle the grain through our elevators at a cost to ourselves and get nothing from the railroad companies to compensate us or offset the free handling it gets in going through their houses.

That is to say, that where grain is shipped through and is actually transferred from one car to another at Kansas City the railroads now

perform that service themselves and charge nothing to the shipper if the transfer is made through their own elevators. If the transfer is made through an independent elevator, the railroad company will make no allowance for it. Besides transferring the grain, the railroad elevators also mix, clean, and clip grain, for which they make no charge. The elevator which cleans, clips, etc., its own grain pays just as much when the grain is shipped out as if the grain was treated by the elevators of the railroad companies. Santa Fe Circular No. 2–A states that on grain shipped by the Atchison, Topeka & Santa Fe no charge will be made for cleaning, mixing, clipping, or rehandling. Has no objection to roads doing work free, but wishes compensation when he does it for them. Union Pacific provides for allowance to all elevators, but makes the stipulation that the cars shall be returned within forty-eight hours, which is practically impossible. Has no complaint against anyone; just wants parity.

Is president of the board of trade of Kansas City.

Q. You want to be in the position that if these elevators are rendering the service they separate it from their tariff, and if they allow the grain to go through your elevator, and an elevator other than the railroad's rendered that service, you want to be put in a position to be paid for it?

A. That is it. Total elevator capacity of Kansas City is nine or ten millions.

Q. Providing for the system of transferring and elevating at a terminal point like Kansas City, what additional help would be required for doing business other than that transfer and elevator business?

A. Very little. There is required ordinarily one or two men, and the additional help required to do this work would be a couple of men. In the Memphis elevator operated by Broadnax, with a storage capacity of 450,000 bushels, the average expense was in 1905 about eighty-two one-hundredths of a cent a bushel, and in 1904
163 ninety-four one-hundredths of a cent. The total amount of grain put through the elevator was 1,789,398 bushels in 1905, and the next year 2,300,000 bushels, and the cost was seventy-one one-hundredths of a cent. This statement would not include anything for repairs, permanent improvement, or insurance on the plant. It does include rent. Thinks a small house could transfer grain at a cost of 1 cent a bushel, while a large house could transfer more grain and it would cost only a cent a hundred.

Elevator was built and equipped for a general commercial business. Would be willing to transfer grain for 1¼ cents. Atchison does the transfer for one-fourth of a cent a bushel, but gets a switching charge in addition. Witness does not believe that will pay the cost to them. For the 1¼ cents witness would treat the grain and prepare it for market, transfer, and consolidate it. Is engaged in handling grain for Peavey & Company; store grain in a public warehouse, but dealers do not wish to put it through a public house when it can be put through the railroad house free. The house is used for public storage and a rate is charged. Also handles grain for himself; mixes

it, etc. Also transfers grain for other people, for which he charges 1¼ cents a hundred, which is a small profit. Has done very little of that business in the last year.

The 1¼ cents allowance for transfer would include storing, mixing, grading, and performing the various services which an elevator performs. Elevator statement shows that the cost would be a little more than that.

Q. Will you please tell the commission why it is that with an expense of eighty-two one-hundredths of a cent per bushel and ninety-four one-hundredths of a cent per bushel for any year you rent an elevator for doing that grain business when you could have all of that service performed by the different railroads centering in and running out of Kansas City free of charge for every car of grain you might have to offer to them for shipment?

A. We do not wish to give up our lease and become tenants of some one else. We wish to be independent and operate our business ourselves.

Q. And it is because you can not do that at a profit, without assistance, you want the commission, if they have the power, to compel the railroad companies to grant you that?

A. Yes, sir.

Statement showing grain elevators in Kansas City, storage capacity, together with elevators operated by railroad companies and private companies and milling companies.

	Operated by—	Storage capacity (bushels).
Elevators operated by railroad companies.		
"A"	Atchison, Topeka & Santa Fe	1,000,000
Kansas and Missouri	Missouri Pacific	1,000,000
Maple Leaf	Chicago & Great Western	500,000
Milwaukee	Chicago, Milwaukee & St. Paul	1,000,000
Total		3,500,000
"Q" elevator, in course of construction, to be operated by the Burlington.		600,000
Private elevators.		
Acme	R. J. House Co	100,000
Empire	Ferd. Heim Brewing Co	350,000
Frisco	Jno. I. Glover (leased from Frisco)	600,000
Grand Avenue	Lanning & Harris	25,000
Gulf	Nash Ferguson Co	650,000
Kansas	Kansas Grain and Elevator Co	45,000
Memphis	Brodnax & McLiney (leased from Frisco)	450,000
Park elevator	C. A. Dayton Grain Co	100,000
Phoenix	Flanagan Grain and Elevator Co	125,000
Rock Island	Carrington Patton & Co	100,000
Rosedale	Fowler Commission Co	150,000
Russel	Russel Grain Co	50,000
A. T. elevator	Jno. I. Glover (leased from A. T. Ry.)	400,000
Southern	Amos Martin	40,000
Star	Geo. A. Adams Grain Co	60,000
Terminal	J. Rosenbaum Grain Co. (leased from Rock Island Ry.)	700,000
Union Pacific	Midland Elevator Co	1,000,000
Wabash	Missouri Grain Co	150,000
Kansas Grain & Seed Co		50,000
Globe Mill	Kimball & Fowler	50,000
Total capacity		5,195,000

Statement showing grain elevators in Kansas City, etc.—Continued.

	Operated by—	Storage capacity (bushels).
Elevators in connection with mills.		
Atlas Oat Co.		25,000
Bulte Milling Co.		75,000
Crescent Cereal Co.		50,000
164 Interstate Mills		50,000
Ismert Hincke Mills		75,000
Kelley Milling Co.		400,000
Kemper Mills		30,000
Minter Bros.		25,000
Ransom Mill		50,000
Rex Mill		225,000
Southwestern Milling Co.		250,000
Westons Warehouse Co.		50,000
Zenith Mills		50,000
Total mills		1,355,000
Total elevator capacity		10,650,000

J. A. MUNROE, freight traffic manager, Union Pacific, Omaha.

There are 210 country elevators along the line of the Union Pacific in Nebraska, of which the Omaha Elevator Company have 74 and the Trans-Mississippi Company 24. Out of the total number the line houses represent 98, or 46.6 per cent of the facilities; the individual houses represent the remainder, 112 houses, or 53.4 per cent. The line houses in the year 1905, with 46.6 per cent of the facilities, did a total of 38.5 per cent of the business, measured by carloads. By line houses is meant the elevators belonging to the two companies, Omaha Elevator Company and Trans-Mississippi Company. For the year 1904 these elevators did 35.5 per cent of the business, and for the year 1903, 40.4 per cent. In the year 1905 at Cozad there were shipped 416 carloads of grain, of which the Omaha Elevator Company shipped 87, or 20 per cent; the Platt Grain Company 123 carloads, or 29 per cent. That is Mr. Leflang's company. The Cozad Grain Company shipped 78 carloads, or 19 per cent; T. L. Carrell, 96 carloads, or 23 per cent; and J. H. Darner 32 carloads, or 9 per cent. At Lexington there were 428 carloads shipped, of which the Lexington Mill & Elevator Company, Mr. Leflang's company, shipped 191 carloads, or 45 per cent. This probably includes flour. H. P. Nelson shipped 142 carloads, or 33 per cent, and A. T. Woodsum 95 carloads, or 22 per cent. The Omaha Elevator Company have no house at Lexington.

To-day, notwithstanding all the storage, cars are frequently scarce east of the Missouri River, and that, too, when the elevators having the contracts have all their bins full. While the transfer feature might properly be sufficient, the Union Pacific, convinced by its own experience that they were not sufficient, made a demand upon Peavey not only for the storage as it exists to-day, but also for providing additional storage as might be necessary in the future.

The object in consigning through to St. Louis is the reflection of an old custom, and in order to have entire possession of a document of the Union Pacific in the shape of the expense bill, which brings about east of Council Bluffs on the out shipment the protection of the proportional rate. All grain is billed to St. Louis, care of the Omaha Elevator Company, at Council Bluffs. The shipment is handled on the local rate of the Union Pacific from interior Nebraska point to Council Bluffs on what we term a local waybill. On arrival there delivery is made to the elevator company, the original bill of lading is retired, and expense bill covering the charges is given to the consignee and the transaction ends so far as the Union Pacific is concerned. All shipments are through shipments and go through the Peavey elevator. No allowance is paid on grain consumed locally.

The Union Pacific daily receives a large number of foreign cars loaded westbound to various points on its lines. No attention is paid to the initials and numbers of cars. When a car is unloaded on the line it is loaded home if possible; if not, it is loaded as far as possible. If a car has its destination in the grain belt, every care is exercised to load it homeward with grain, giving preference to through shipments routed east of Council Bluffs via the line owning the car, if the car is owned by a line west of Chicago and a direct connection of the Union Pacific. If not, but but a line east of Chicago, the car is not given to it; it is loaded as far as Council Bluffs or Chicago, regardless of the ownership east thereof. A great many foreign cars are loaded with grain of Peavey & Company, and when the cars are unloaded at Council Bluffs the obligation is with the Union Pacific to return them to the road from which it received them, but if it is a Chicago line sometimes the cars are sent back west. The storage capacity of the Omaha Elevator Company was made at the request of the Union Pacific in order that the business might not be held up in times of rush. The transfer allowance of 1¼ cents was not a device or rebate in any manner, shape, or form. At the time the contract was made the allowance at Chicago was three-fourths of a cent a bushel, which on wheat is 1¼ cents per hundred. This made the allowance on corn only 7 mills, and 4 mills on oats. This contract was based on Chicago, and was worth more than it cost to the Union Pacific in the opinion of the witness. At the time of the negotiations of the Peavey contract the Union Pacific had an elevator of its own at Omaha, or one in which it owned 60 per cent of the stock, and this elevator was leased to Mr. Peavey and operated by him. It has now been dismantled and the ground is now used by the Union Station and approaches.

There are certain transfer allowances here (at Chicago) at a quarter of a cent a bushel, but the three-quarters of a cent a bushel is obtainable through the public houses. The situation at Minneapolis is different from that at Omaha, because at Minneapolis there is a market, and at the time of the making of the contract there was no market at Omaha. The fact that there is a market at Minneapolis makes no difference in the service performed in transferring grain

from car to car. Market conditions do not affect the standpoint of railroad operation. The service and the revenue are the same when grain is consigned through to St. Louis and when billed locally to Council Bluffs. There is no other shipper for whom the Union Pacific issues the through bill but Peavey & Company and the Trans-Mississippi Company.

On cross-examination witness stated that at the time negotiations were begun with Peavey & Company they had no interest on the Union Pacific. At the time of the making of the contract Peavey & Company were established on the line of the Union Pacific and had 70 or 80 elevators and two terminals at Council Bluffs and Omaha with a capacity of something between one and two million bushels. Peavey & Company have conducted a general business in the elevator all the time.

In the calendar year 1905 the total movement of grain on the Union Pacific to Omaha and Council Bluffs was 19,852. The allowance for transfer was extended to all elevators at Kansas City, Council Bluffs, and Omaha because there being a large number of new houses it might be contended that the contract would be discriminatory. The Union Pacific did not consider it as discriminatory. There is a terminal elevator on the Union Pacific at Denver of about 500,000 bushels capacity. Union Pacific delivers carloads of grain into that elevator destined to points beyond and pays no allowance.

At the time Mr. Munroe entered the service of the Union Pacific, in 1882, there was an old elevator at the terminal that was operated by Merriam & Himebaugh, with a capacity of about a million bushels, constructed partly by the Union Pacific and some local capital, which was leased to the above firm shortly after its erection. The Union elevator was constructed in Council Bluffs about 1883 by six railroad companies and was leased to the Council Bluffs Elevator Company. Mr. Peavey in 1890 leased these elevators and acquired a line of houses on the Union Pacific.

Since 1882 these elevators had arrangements with the Union Pacific and were paid allowances sometimes larger than 1¼ cents. Prior
166 to 1887 it was due to a struggle for the business entirely. From 1887 to 1899 competitive conditions sometimes were responsible for the rebates and sometimes it was payment for services.

After the old Union elevator was burned and the new Trans-Mississippi elevator was built there was a contract similar to that of Peavey & Company entered into. This was in the two years previous to the hearing.

There was formerly a contract between the Midland elevator and the Union Pacific Railway, but the receivers refused to recognize the contract and no new contract was ever entered into.

No allowance has been paid in the last sixteen years to any elevator outside of Kansas City, Omaha, and Council Bluffs. Conditions at Denver are considered dissimilar, although grain leaves the lines of the Union Pacific and goes on lines to the West and South.

There is another class of business on which railroad companies pay allowances for unloading, which is live stock at Missouri River. The companies place the cars at the chute and the animals walk out, unloading themselves. The charge is allowed by all the railroads and is 50 cents a car at Kansas City, and the allowance is made to the stock yards at South Omaha.

This allowance is paid to the stock yards company and not to the owner of the stock.

Does not consider that a consignee who has no elevator who releases the cars of the Union Pacific is entitled to the allowance just the same as the elevator. Does not think it is any discrimination because one party has provided facilities and has entered into a contract. The general custom the country over is for the consignor to load and for the consignee to unload carload freight. Tariffs provide rates on carloads of grain from points of origin in Nebraska to Omaha and Council Bluffs, and, independent of this contract, the consignee would be required to unload that carload of grain. Would not only be required to unload, but presumably would be required to provide the place where the shipment could be put. Rules of the western classification expressly provide that the consignor or consignee shall unload carload freight.

The Peavey elevators in the country are of modern construction and of larger capacity than those of the independent elevators, and therefore the estimate of the percentage of the business that Peavey & Company do would show that Peavey & Company were doing a smaller proportion than the above house-to-house statements show. This statement does not include grain that is sold by farmers and independent elevators to Peavey & Company. Practically 30 per cent of the grain received at Omaha and Council Bluffs over the Union Pacific is sent through the elevator of Peavey & Company. Less than 50 per cent of all the grain shipped into Council Bluffs and Omaha from all over the Union Pacific during 1905 received the allowance.

Motive in executing the Peavey contract was to keep the cars at home and because grain business represents a large movement which moved hurriedly in comparatively short periods.

Although the conditions at Kansas City may be similar to those at Minneapolis and the transfer charge at Minneapolis has been reduced, the Union Pacific has not seen fit to reduce the transfer charge at Kansas City, because they have considered Council Bluffs and Kansas City together and did not wish to reduce the charge at one place without reducing it at the other.

Putting up of elevators and extension of tracks for the handling of business at Omaha made a change in conditions, so the tariff of June 27, 1906, giving the allowance to all elevators, was put in.

We treat the Peavey shipment as a local shipment, so far as local waybill is concerned—that is to say, we use the same form there, the same kind of bill, made out with the same pen and ink, no doubt,

and handle it on a local waybill, when, as a matter of fact, the Peavey business is through business.

167 So far as the release of equipment is concerned, so far as the service which is performed by both is concerned, it is identical, whether the business goes through or whether it stops at Omaha, Council Bluffs, or Kansas City. Although grain brought into Kansas City, ground into flour, and shipped out is treated by the railroads as a grain shipment from the point of origin to the point of destination, the flour taking the balance of the through rate at exactly the rate paid on grain, the allowance is not made to millers, although the millers release the equipment.

Does not believe the elevation allowance is reflected back into the country or to the points of destination.

Thinks the payment of the allowance under the tariff of June 27, 1906, should be confined to the elevators who actually do the transferring, just as named in the circular. In case a grain dealer has grain transferred through a railroad elevator for which he is charged nothing should not be paid.

Q. Have you arrived at sufficient conclusion as traffic manager and in your own mind whether to allow the Chicago & Great Western, that performed this service and released the equipment, 1¼ cents a hundred under this circular?

A. Yes.

Q. So that any claims presented of the character of the Great Western where they or other railroads release the equipment through their elevators under the forty-eight-hour limit, under that provision of this circular, will be paid?

A. That is my understanding.

The difference of situation at Denver and Kansas City is in volume of business and in interchange with connecting lines. It is not a terminal point to all the business of the Union Pacific, but is a terminal point for the small amount of grain that goes over the Denver & Rio Grande and the Colorado & Southern. The service of releasing equipment is practically the same in both cases, but the necessities for the return of the empties are very much less at Denver than at the Missouri. The actual service is identical. A technicality which has delayed the payment of claims of elevators is the consideration of whether or not the allowance should be paid for the release of, for instance, a Chicago & Alton car at an elevator situated on the Chicago & Alton tracks when the car is not actually returned to the Union Pacific. There have been constructed on the lines of all the railroads in Kansas and Nebraska associations known as Farmers' Elevator Company Associations, formed by a number of farmers associating themselves and building elevators and trackage facilities.

Since the previous hearing the rate has been changed so that the combination of the locals from the point of origin to destination is just the same as the through rates.

The CHAIRMAN. Upon what theory, Mr. Munroe, do you claim that that is a through shipment? Of course, you know in a commercial

sense that that grain is bound to go, sometime, beyond the Missouri River, because you know that there is no consuming market there adequate to take care of all that great production; but upon what transportation theory or how, in a transportation sense, can you regard such a movement as a through movement, where there is in no instance a carload billed to the point to which it is expected that that car will go; where, as you have already stated, the operations of your company, the rates of your company, everything in which your company is interested, are precisely the same as though the shipment was to be consumed at Omaha, and where in addition the through rate to any given destination is exactly the sum of the locals? Now, in what transportation sense can you regard that as a through shipment?

Mr. MUNROE. Why, I think the presence of the elevator at Council Bluffs, put up there under this contract, in accordance with plans insisted on by the Union Pacific, does not in itself change the character of the business. Furthermore, I believe that if Peavey & Company did not have that house there that that company would not operate to change their conditions in the interior, but, on the contrary, they would operate their interior houses just as now, and we would be called on then to furnish either cars to go through to destination in the East without transfer, or to funnel it through other houses at our terminal points, and therefore, as I can see, and I have tried to see it fairly, it is purely through business, and it is
168 stored there as a commercial necessity for the Union Pacific, because it has not enough equipment and can not afford to always have plenty of cars to go through from origin to destination without transfer on every shipment. I say can not afford to, because a portion of the year we would have so many idle cars that the burden of providing them would be quite material. That fact, and also the well-known one that there is practically none of the grain consumed in Omaha or Council Bluffs which they handle, makes me feel that it is nothing but through business. It is through business perverted, if you want to use that term, by our necessities. The same condition regarding through shipments exists at Chicago.

On pages 979 to 986 the question of whether or not the shipment of grain from a point of origin in Nebraska to Omaha, thence after several months' storage shipment East, constitutes through transportation was taken up.

The discontinuance of the allowance by the Union Pacific would give an advantage to other carriers who have lines east of the Missouri River whose interests is to haul the grain through to the eastern terminals of their railroads and to keep it out of Omaha. If it breaks bulk at Omaha, they lose a certain part of their hold on the business.

Does not know of any place where the conditions are similar to those at Council Bluffs and Kansas City. The Peavey elevator at Council Bluffs is a private elevator, as the term is used in Chicago.

Mr. H. GOWER (recalled):

The cost of the elevator at Kansas City was $257,252.49, which included the $5,000 paid to Mr. Rosenbaum. The $5,000 was to cover the interest on the investment of Mr. Rosenbaum, or the money advanced by Mr. Rosenbaum in the building of the elevator. The figures made up by Mr. Rosenbaum of the exact interest that accrued was $4,935.75. The amount of bills rendered to Rosenbaum Grain Company up to the time of suspension of payment of 1¼ cents was $13,224.43, of which they paid $3,577.42. At that time a dispute arose and the matter was delayed in adjustment.

The suspension of the 1¼-cent allowance was in consideration of the waiving of rental charge during the same time. The back rent was to be collected.

Would consider that if allowances were made at Kansas City or any other point, it would cause allowances to be made at every other grain center under similar conditions. Considers the granting of allowances as practically reducing the rate.

There is no difference in principle and effect, except possibly, in degree, measured in dollars and cents, between the giving of elevator allowance or between furnishing a big plant free. There is no difference in principle in paying somebody else for doing the service or putting the railroad company's money into an elevator of its own, providing a service, and doing the work itself free of charge.

Thinks elevator facilities are absolutely necessary to the Rock Island at Kansas City. Rock Island could not get an elevator constructed unless they allowed the 1¼ cents allowance. The necessity of the Rock Island for the elevator was independent of the Peavey contract, but it was found that during the existence of the Peavey contract an elevator could not be obtained without duplicating the Peavey contract. To compete with the Union Pacific under the Peavey contract other roads put in an elevator allowance and sometimes the allowance was paid where the actual elevation was not performed. This allowance caused more instability in grain rates than any other thing.

The proportional rate west of the river is fixed regardless of where the grain originates and is applied on any grain that anybody can present an expense bill to cover west of the Missouri River.

169 Q. That means, if I understand you correctly, that in the case of the Midland Elevator Company or Peavey & Company, say at Omaha, if they brought in grain to Omaha and got an expense bill from the Union Pacific Railroad Company, they could traffic in that expense bill and anybody else could use it outside of Peavey & Company for getting the balance of the proportional rate on an outgoing shipment?

A. I think there is no doubt about that. I have never heard it denied. Thinks this has been done. Does not know of any instances where this has been done with knowledge of the facts by the railroad officials.

Thinks the 2,000,000 bushels of Iowa grain shipped into Omaha which went east on a proportional rate and the lines that took it knew that it was Iowa grain, was shipped on a regular published tariff, maximum rate would be the Iowa distance tariff to Council Bluffs plus the rate out. (This grain was mentioned in previous hearing in the testimony in this record.)

JAMES PETTIT, president and manager of the Peavey Grain Company of Chicago, which owns two elevators in South Chicago, one of capacity of 750,000 bushels and the other 1,600,000 bushels. One of the directors of the Chicago Board of Trade and on the Transportation Committee:

In Chicago there is an elevator capacity of 24,000,000 public and 43,000,000 private. A public warehouse or regular warehouse is one chartered under the laws of the State of Illinois to act as custodian for grain belonging to the public. A private warehouse is engaged in the transaction of private business. There are six or seven so-called railroad elevators in Chicago with an aggregate capacity of not in excess of a quarter of a million bushels.

The charge at public elevators provided by law is three-fourths of a cent per bushel inclusive of ten days' storage. This includes putting in and taking out. For every day over ten days one-fortieth of a cent per bushel is charged. This charge is for grain in good condition. A higher charge is made for grain in poor condition.

Has made transfer through his private elevators for as low as one-half cent a bushel. Cases are very rare. One of the Peavey elevators is a public house and the other a private house.

Understands that transfer is made for railroad companies for one-fourth of a cent a bushel, but has never heard of it being done for anyone else, except as testified to by Mr. Stream.

The three-fourths of a cent provided by law is a maximum charge allowed. Understands that at Minneapolis grain is put in, stored, and loaded out for one-half a cent a bushel, storage for ten days. The customary charge for simply transferring grain for the railroad companies from car to car through an elevator is one-fourth of a cent per bushel. A majority of the grain that comes into Chicago is handled by private concerns for the profit on the grain.

Mr. N. MERRIAM, Omaha, Nebr.; elevator business, having two elevators, located on the belt line owned by the Missouri Pacific about a mile apart, with a capacity of six hundred and a hundred and twenty thousand, strictly private terminal elevators. One has been built about eighteen years and the other about nine months:

Has no country elevators, but buys grain from independent dealers and line houses wherever possible. Buys some on the exchange. The principal source of trade is giving shippers the benefits of a terminal elevator. Handled about 6,000,000 bushels of grain during the previous year; half corn and balance oats and wheat. Receives grain on consignment and sells as a commission house. Stores,

transfers, or manipulates grain for other persons, but this is a rare thing. Usually arrange to purchase the grain. Has never done any transferring for less than 1¼ cents per hundred pounds, which includes ten days' storage if necessary. The identity of grain transferred is preserved.

It is an injustice to independent shippers to have railroads doing a transfer business and manipulating the grain in any way free of cost to anybody. "It competes with the elevators and gives the benefit of the investment in an elevator, say, as ours is, of $150,000, and the cost of managing that elevator free to a party with an office, you might say, in his hat, without any capital, to take the business right out of our hands, with the assistance of the railroad giving him all these benefits that cost us hundreds of thousands of dollars."

If a railroad undertakes to carry a car of grain through from point of origin to some eastern destination and for their own convenience prefer to transfer the grain to other cars at Omaha, they would have a perfect right to do that.

Where railroads offer opportunity of free transfer anybody can bid the whole western country for grain on that basis and come in competition with men with hundreds of thousands of dollars invested and who are using hundreds of thousands of dollars capital besides, and can ruin their business with the assistance of the railroads.

Is situated on the Belt Line. Buys on the line of the Union Pacific and gets along very well. Ships over the Union Pacific and gets allowance for releasing their equipment. Thinks the sales on the Omaha Grain Exchange do not exceed from 6 to 10 cars a day. Omaha has been discriminated against by the railroads in the matter of rates. To a large extent on all roads except the Union Pacific the through rates are less than the combination of locals. I might say that in the large part of Nebraska the rates are fixed up, lined up, for Chicago, Kansas City, and St. Louis, and Omaha is cut out. That refers to a large part of southern Nebraska. In northern Nebraska they have been lined up from Minneapolis and Chicago, and Omaha was cut out. This does not apply to the Union Pacific. The North Western discriminates by making its through rate from 1 to 3 cents lower than the sum of the two locals via Omaha.

The through rate is less than the local to Omaha and the proportional out. Thinks the railroads should be prohibited from giving free transfer.

Q. The existence of large elevators and large elevator capacity is necessary to a thrifty and healthy grain market?—A. There is no question about that.

Allowance that he received from the Union Pacific was five-sixths of a cent per hundred. Received it until 1905. Since then claims have not been paid. Has never objected to payment by Union Pacific to Peavey & Company. Thinks all elevators should receive the allowance. More has been paid on the Union Pacific when the allowance was being paid than on the other lines for grain.

Mr. HEFFELFINGER (recalled):

The estate of F. H. Peavey is a partner in the grain business and owns about 3,000 shares of B preferred stock of the Chicago Great Western. There are in Kansas about 1,279 country elevators, of which 956 are independent and 323 line. The line elevators are operated by companies who have several elevators; on the Union Pacific there are 71 line elevators and 147 independent; of the 71, Midland Elevator Company owns 40, Hoffman Elevator Company 21, and Morrison Grain Company 10.

Elevators in Kansas.

Railroad.	Line elevators.	Independent.	Total.
Atchison, Topeka & Santa Fe	83	309	392
Missouri Pacific	90	216	306
Chicago, Rock Island & Pacific	50	103	153
Union Pacific	71	147	218
Leavenworth, Kansas & Western	12	6	18
Frisco	.....	70	70
Chicago, Burlington & Quincy	17	23	40
Missouri, Kansas & Texas	.....	26	26
Grand Island	.....	34	34
North Western	.....	22	22
	323	956	1,279

There are in Nebraska about 1,285, of which 756 are independent elevators and 529 are line elevators. On the Union Pacific there are 121 line elevators and 114 independent. Peavey & Company operate approximately 70. Midland Elevator Company purchased during the time, from July 1, 1905, to October 1, 1906, 341 cars out of the total receipts from various railroads on the exchange at Kansas
171 City, shown by the records of the board of trade as 8,621 cars, or less than one-half of 1 per cent of the stuff that came to Kansas City that went on the board of trade. Purchased by the line houses of the Midland Elevator Company, 2,464 cars, of which 578 cars were shipped west, 341 cars were sold to millers, 114 cars shipped to Kansas City and sold on the exchange and did not go through the elevator. Besides the 40 elevators on the Union Pacific, Peavey & Company have 10 elevators on the Leavenworth, Kansas & Western. About one-half of the grain purchased by the country elevators of Peavey & Company never went through the elevator and never received the allowance. Thus, of the grain that came into Kansas City, Peavey & Company owned about 1,400 cars and others 7,200 cars, and of those 7,200 Peavey & Company purchased about 182 cars of independent dealers and 341 on the board of trade.

Of the number of foreign cars in the statement made up by Mr. Chase which were received at the Peavey elevator, many were received with grain which came from Iowa. There were 1,700 cars received with the Iowa grain, and of this number a very small percentage were Union Pacific cars.

In Santa Fe Elevator Company Circular No. 2 provision is made whereby cleaning, mixing, clipping, or rehandling will be done and a charge made unless the traffic moves out via the Santa Fe. They are thus furnishing facilities for other merchants with whom all must compete and charging nothing for the service, provided it goes out over the Santa Fe.

"In interpreting Chicago Great Western G. F. D. No. 13059, it would lead me to believe that it is possible, not the intention possibly, for anybody with any amount of storage to have it handled in the Great Western Elevator for any length of time by simply saying they (the railway company) could not furnish cars."

Conditions at Minneapolis are not similar to those at Kansas City and Omaha. At Minneapolis there is a large consuming market. Elevators have opportunity of buying, selling, and storing grain as well as mixing and getting profits

If it were not for those advantages and the fact that the Union Pacific by their allowance practically pays the expense to us of running the elevator, we could not afford to run it. Could better by far go back in the country and build storage there at probably half the cost of what it would be in Omaha and have every advantage of through shipment. Have elevators at Chicago, Minneapolis, and Duluth and could arrange to clean grain in them for nominal amount.

There is no advantage in billing grain through to St. Louis, and Peavey & Company would bill it locally if requested to. Interprets the tariff providing for the proportional rate from Omaha to the East as applying on grain from Iowa.

Tariff of Chicago, Milwaukee & St. Paul provides for no charges for transfer, including elevation and reloading, when the shipments are forwarded via the Chicago, Milwaukee & St. Paul.

All cars go into the elevator, whether they are Union Pacific or foreign cars, and are unloaded and then switched back to the tracks of the Union Pacific the same day and are without the jurisdiction of the elevator company, and if they are sent to the elevator it is because of orders placed with the railroad companies.

Actual cost of operating the plant is more than the allowance. Even if the actual cost of transferring grain for others were less than 1¼ cents per hundred, it would not act as a rebate, because they have a right to obtain whatever they can for the elevator service, and they would not transfer a man's grain if there was no profit. Since the last hearing the actual cost of operating the elevator has increased.

For a strictly car-to-car transfer only a skeleton of a house is needed, with a leg, facilities for weighing—that is not necessary unless the weights should be obtained, but usually would be
172 customary—and sufficient bin capacity to take care of the few cars of grain. The time storage capacity is needed in the market is in the rush of business, when more is coming from the country than can be taken care of and can be stored. At that time a car-to-car transfer would be inadequate or absurd, because if the

car is there to go out, a simple exchange of cars could be made by the railroads.

Grain which goes into the elevators at Chicago is considered as having stopped there, and any transportation afterwards is another matter. If this was done at Omaha the business would be unprofitable and ruin the Missouri River markets. The elevators at Chicago and St. Louis would have the entire amount of grain to compete for, coming from all the fields. Would sooner have his cleaning, etc., done in the country than run the elevator if there was no allowance. The elevator is profitable to us only so long as we can continue the contract. A business man would not locate a jobbing house out in Nebraska as quickly as he would in Chicago. He would not locate an elevator at a point where he had only the grain tributary west, as in Nebraska. The quantity is cut off to just that amount of grain which they can raise around there, and he must depend upon that. I would not locate an elevator at Omaha as an elevator proposition, nor Mr. Peavey never would have done so, because he has elevators at Minneapolis and at Chicago, we could have put a house at St. Louis and could have had the work done there a good deal cheaper. I would much rather have the capacity in the country where the insurance is cheaper and where I had the same facilities for through billing at the time I was to ship out. Other men have built elevators at Omaha because they understood that the allowance would be paid.

Mr. RANKIN, representing the Rock Island Railroad Company:

Contracts of the Rock Island with Rosenbaum & Company were introduced by Mr. Baldwin, and Mr. Rankin wished to explain why the rental of these elevators was only nominal, $1 a year. These elevators are about the oldest elevators in Chicago. After contracts with Counselman Company were ended the elevators remained empty for a considerable length of time, and no tenants could be found who would pay any consideration as rent, as the rate of insurance of the contents was doubled by the insurance companies. These elevators were leased to Rosenbaum for the nominal rent, because, through having these elevators occupied, the Rock Island received some $15,000 a year in switching charges to the elevators.

D. O. IVES, general traffic manager of the Wabash System, St. Louis, Mo., for fourteen months. Previously general freight agent of the Burlington, west of the Missouri River, at Omaha. Prior to that general freight agent of the Missouri line of the Burlington at St. Louis. At Omaha three years and at St. Louis thirteen years:

Wabash runs from Council Bluffs to Omaha and Kansas City on the west, to Buffalo on the east, with a line running to Chicago and through St. Louis. Is familiar with the movement of grain and elevator facilities at Buffalo. Trunk lines pay one-half cent per bushel on the grain transferred from the elevators on the water, on the lake-

side, into their cars. Some of the receiving lines pay a quarter of a cent a bushel on grain received by all-rail lines. This one-half of a cent is paid to elevator companies, part of which are railroad companies' and part private. This is paid out of the rate.

Wabash have trackage rights over the Grand Trunk and the use of their facilities, which are very insufficient; 50 cars were shipped from our line, and it congested them for a week or two. The one-half cent allowance is confined to ex-lake grain. There is an allowance for transferring grain at Buffalo, where the grain comes in by rail, of one-fourth of a cent a bushel, paid out of the rate. The Wabash gets no grain to pay the allowance on—that is, when the Wabash takes grain to Buffalo they make an allowance of one-fourth of a cent to the connecting line for transfer. From experience and knowledge of witness it is his positive view that it is entirely necessary for railroad companies to have elevators at their termini for the expeditious handling and transfer of grain. It is more practicable for the railroad to hire the service of transferring grain performed by an elevator company and pay an allowance for doing this than it would be for the railroad to perform the service itself.

173 I think that if proper elevator facilities are furnished at near-by termini—as, for example, Omaha for Nebraska and Kansas City for Kansas—the effect is beneficial to the community, to the farming and grain-growing community, and to the railroads, because it enables the cars to do their maximum work. They can be handled promptly to the near-by termini, unloaded there, and then run back to the grain field. That is not the case where the grain goes to distant terminals, because on account of the congestion and disagreements between the originating railroad and the other railroads oftentimes cars are hung up at terminals on junction points, because there is a controversy between the roads as to cars; also because of congestion at distant points. The farmer gets the benefit of it because he gets a ready market and prompt payment for his grain. It is necessary for the preservation of markets to have ample storage, and if the payment of an elevator allowance is necessary in order to encourage the building of elevators, it is a good thing, provided the allowance is paid indiscriminately to all parties owning elevators, for prompt release of equipment.

Through carriers naturally wish to secure the longest haul for the largest share of the grain possible and endeavor to force the grain through to their long haul, but the fact that the through lines are building elevators would indicate that they think there is a necessity for furnishing elevator facilities.

Wabash pays allowance at Toledo for unloading cars. The elevators at Buffalo are operated to facilitate and complete through carriage just as they are in Omaha. Grain is held in the elevator as a depot. The elevator is not a railroad necessity as a mere matter of transfer or through shipment of grain. Allowances help to build up the communities and markets and are to some extent caused by competition of railroad-owned elevators. "Referring to the operation

of the road, simply carrying the business without reference to the securing of the traffic, without being a transportation man, I can not see how it (allowance) has any effect or bearing on the transportation question."

Does not think that the payment of allowances is equivalent to a reduction in the rates. "It seems to me it is a distinction without a difference." The real service paid for is for the holding of the grain in the elevators until the cars can be furnished to go out—that is, releasing of cars or holding of the grain until the other cars can be furnished.

An allowance for loading out or receiving grain in an elevator would have a corresponding effect upon the other roads as reduction in the rate, if the question is simply answered yes or no.

An elevation allowance of one-fourth of a cent a bushel is paid to all elevators at Toledo, Ohio, by the Wabash. The owner of the grain runs the elevator. It is not paid to millers. The grain man does not perform any different service in releasing the equipment than the miller does. The reason for the difference in the treatment accorded to the miller is that it has been generally conceded that the manufactured product is entitled to a higher rate.

Q. Well, was it an endeavor to even up a traffic proposition or commercial condition that you are trying to fix up or to balance off this advantage you give the miller—some kind of an advantage to the elevator man so as to let him operate and send the grain on farther?

A. It relieves any possibility of discrimination, I think. I meant to say that the fact that the miller gets the milling-in-transit privileges when it has been generally conceded that from 1½ to 2 cents more might be reasonably charged, relieves the railroad from any charge of discrimination if they do not make an elevator charge to him, even though they make it to an elevator in the grain business only. Cars are not unloaded as promptly at elevators of millers.

174 An elevator allowance is paid also at East St. Louis, Nashville, Louisville, Evansville, Cairo, Buffalo, Detroit, Chicago, Toledo, etc. At Toledo the allowance is one-fourth of a cent a bushel. Parties at Toledo would unload their grain from the car to their own elevator just the same if the allowance was not made.

It would be advantageous for a line having lines only east of the river to have the allowance made at Omaha or Kansas City, so that the grain would be stopped and stored, and thus it would get a share of it over its road on its journey east. When witness was with the Burlington, was very anxious to have them build elevators at Omaha to compete with the Union Pacific in the question of prompt return of cars, because they always had a better supply of cars in the country than the Burlington.

For a purely transfer proposition an elevator could be erected at a comparatively small expense. It would not be necessary in that regard to have any storage capacity to hold the grain for greater or less

amount of time awaiting the competition of eastern roads to take it out, but it could not accomplish the object at all.

No allowance is made for unloading grain at St. Louis. The matter of paying the allowance at St. Louis is under consideration. Cars are not unloaded as promptly at St. Louis, because the facilities are not as good. The greater part of the grain that goes to St. Louis goes south and the southern roads pay three-fourths of a cent allowance.

The allowance is paid at Toledo on grain going out of the Peavey elevator at Council Bluffs.

The Wabash pays at the Missouri River one-half cent a hundred, but this is not paid on grain that comes from the Union Pacific which has already received the allowance.

Q. You don't understand my question. At Toledo you pay, don't you, on grain that comes out of the Peavey house?

A. On grain that comes out of the Peavey house. Yes, sir; but it equalizes itself with the half cent paid.

Real object of the outgoing line in paying allowance is for holding of grain in the elevator awaiting outgoing cars. I claim that this is a service that is equally important to the in and the out line to compete with a through line.

M. B. KOON,
FRANK HAGERMAN,
Solicitors for Complainants.
F. C. DILLARD,
Solicitor for Union Pacific Railroad Company.
ARBA S. VAN VALKENBURGH,
P. J. FARRELL,
Solicitors for Interstate Commerce Commission.

175

EXHIBIT I, PART 2.

ABSTRACT OF TESTIMONY BEFORE THE INTERSTATE COMMERCE COMMISSION IN THE CASE OF TRAFFIC BUREAU, MERCHANTS EXCHANGE OF ST. LOUIS, V. CHICAGO, BURLINGTON & QUINCY R. R. CO. ET AL.

[Hearing at St. Louis, Mo., October 23, 1907.]

INDEX TO WITNESSES.

	Original.	Print.
Cochrane, M. W	184	239
Crosby, C. H	176	228
Gower, H	182	236
Hall, Marshall	184	240
Inman, Bruce	183	238
Leland, C. A	180	233
Powell, Geo. F	183	238
Rausch, C. C. P	177	230
Stith, W. C	178	231
Voorhees, E. K	180	234
Washer, W. S	182	237

176 Hearing at St. Louis, Mo., October 23, 1907.

GEORGE H. CROSBY, freight traffic manager of the Chicago, Burlington & Quincy Railroad Company:

Rate of the Burlington, as shown in tariff I. C. C. 8488, from Friend, Nebr., to Omaha is 10.2 cents per 100 pounds on wheat and 8.5 on corn. Rate as shown in tariff I. C. C. 8523, from Friend, Nebr., to St. Louis is 19.2 on wheat and 16½ on coarse grain. Rate from Omaha to St. Louis is 9 cents on wheat and 8 cents on other grains. Through rate is equal to local plus the proportional. Tariff C. B. & Q. 1999–C, I. C. C. 8626, provides for an allowance for the transfer of grain at the Missouri River of cost, not to exceed three-fourths of a cent per 100 pounds—that is, at Council Bluffs, Omaha, South Omaha, Kansas City, St. Joseph, Atchison, Leavenworth, Elwood, Nebraska City, Rulo, and Lincoln. The adjustment suggested is fairly representative of the stations on the Burlington. It is not made the same through all Missouri River gateways. In some instances it is made by Omaha and in others by other Missouri River points. In order to determine the rate from a Kansas or Nebraska point, the rate from the river is added to the local up to the river.

"The rate to Kansas City we have established added to the rate from Kansas City might make the through rate, but we would not, in our method of handling the business, take the business that way, if it was consigned to Chicago or St. Louis." While the combination would determine the rate, it would not necessarily determine the route.

Rate from Friend to Kansas City is higher than to Omaha, "so the combination in that instance would not make through Kansas City." The rates from Omaha to St. Louis would apply on any business forwarded from Omaha originating beyond the Missouri River, regardless of whether there was a joint through tariff or not.

On grain received from an elevator at Omaha the charge for transportation to St. Louis would be 8 cents on corn, and the Burlington would pay to any elevator except those receiving over the Union Pacific three-fourths of a cent per 100, which is practically a loading-out charge. The three-fourths of a cent is paid for transfer. It is a matter of indifference to our road what else is done provided the road gets its service. The allowance is paid for a service at Omaha, and 8 cents is for hauling the grain to St. Louis. Grain might come into Omaha in a foreign car, which under present conditions would cost 50 cents per day. It might be cheaper to pay for the transfer than to pay that rental. Then there is the possibility of having cars loaded to the full capacity. Can not always load cars to their full capacity at country elevators. The allowance would be made if the grain came to Omaha in Burlington equipment and went to St. Louis in Burlington equipment, if it is transferred through the elevator. This practice is forced by competition, because another line would pay for the transfer if the Burlington did not, and get the haul

to St. Louis. Grain shipped from Friend, Nebr., through to St. Louis would probably not go through Omaha, because Omaha is a little off the direct line. There is some additional expense in hauling grain into Omaha and then reshipping to St. Louis, but the rate to St. Louis from Friend is made on competition over which road has no control.

The transfer allowance has no connection with the tariff rate; it is a separate charge. It has nothing to do with the price of grain at Friend, Nebr., unless the man who transfers the grain is in the grain business. A great deal of the transferring is done by parties not in grain business. The grain dealer would not get any advantage unless it cost him less than three-fourths of a cent to transfer the grain.

177 "A good deal of this transfer work is done by parties who own a line of country elevators. Say a grain firm owns 50 or 100 elevators in the country. They have that many agents buying grain. Of course they are buying the grain under general directions from headquarters. For example, they may tell the country dealer to pay a certain price for No. 3 wheat, and he pays that price for what in his judgment is No. 3 wheat. When he gets a carload, suppose he advises the owner at headquarters that he has a carload of No. 3 wheat, and he gets instructions to ship it direct to St. Louis, for example. It lands in St. Louis and the inspector here says it is No. 4 wheat. The St. Louis man has the settlement of the matter practically and entirely in his own hands. So the owner of this line of elevators says, 'I can not do business that way; I am entirely at the mercy of my people at the east end,' and he wants for his own purposes a central point where he can examine this grain before it is disposed of in the markets and manipulated. In other words, I think that these elevators at terminal points, at these important points on the Missouri River, are essential to the business of the parties that operate them—more for that purpose than for any transfer purpose."

Since the Burlington has been paying the transfer allowance at the river, the movement from the territory west of the river to St. Louis has increased over 5 per cent, comparing the period from July 1 to September 15, 1906 and 1907. The Great Western owns and operates an elevator on the Missouri River through which grain is transferred free of charge. Does not know of any private individuals on the Missouri River who operate an elevator who are not either grain buyers, sellers, or have a line of elevators in connection with the terminal elevator. The Updyke Grain Company owns an elevator at Omaha to which some of their grain is shipped, and they also lease a portion of the storage of the Chicago Great Western elevator.

But for the competition of the Burlington with other carriers it would not be necessary for them to make this transfer allowance. The Burlington has stood ready to make the transfer of the Union Pacific grain without expense to them. It is a more paying proposi-

tion for the Burlington to have grain shipped through from point of origin to St. Louis instead of transferring at Omaha. If the Burlington should reduce the rate through three-fourths of a cent to equalize the rate to St. Louis, the Great Western, for example, would also reduce their rate—that is, they would insist that the freight rate from the point in Nebraska should be the same as the local combination on the Missouri River. Is forced to pay the allowance. Would not pay it for a second if could get out of it. Theoretically the grain dealer who buys grain in Nebraska and reaches the same market that the grain dealer in St. Louis reaches would be able to place his grain at the destination three-fourths of a cent cheaper provided there was no expense of putting the grain through the elevator, but it might cost that to put it through the elevator.

In St. Louis the elevators are not owned by the grain men and the grain men pay the elevators for handling grain. Understands that the St. Louis grain dealers are receiving three-fourths of a cent on business going east and southeast. As far as the Burlington is concerned in the paying of transfer charges, St. Louis is entirely different from points on the Missouri River because the Burlington has nothing further to do with the grain after it reaches St. Louis. Finds no competition at St. Louis that compels it to pay transfer.

Elevator charge is paid whether it is through a public or private elevator; is paid to anybody who performs the service. There has been some increase in the business from Nebraska points to Omaha on the Burlington.

C. C. P. RAUSCH, assistant general freight agent, Missouri Pacific. Has been in the service of the railroad eighteen years. Has charge of the publication of tariffs. The situation of the Missouri Pacific is pretty much the same as that of the Burlington. Generally the rates of the Missouri Pacific are made up on the same basis as those of the Burlington. But in the central and southern portions of Kansas they are not always the full combination.

178 Missouri Pacific brings some grain into St. Louis and carries it out for some southern destinations. On grain destined to Texas they pay three-fourths of a cent elevation charge, because it comes in competition with the Missouri, Kansas & Texas Railroad. No allowance is paid when destined to the southeast, as Missouri Pacific does not reach the so-called southeastern markets. Missouri Pacific does ship considerable grain from Kansas and Nebraska to Texas on which allowance is paid to St. Louis elevators as well as to the others. This allowance was made to meet competition of Missouri, Kansas & Texas. Grain which goes to Texas from St. Louis originates in Kansas and Nebraska. The rates are higher by way of St. Louis than they would be direct.

W. C. STITH, freight traffic manager Missouri Pacific Railway Company:

Tariff I. C. C. A–146, Missouri Pacific Railway and St. Louis, Iron Mountain & Southern freight tariff of Elevation Charges No. 201–B reads as follows:

"On shipments grain and seed, carloads, shipped via the rails of these companies, transferred through elevators located at Omaha, South Omaha, Nebr., Atchison, Leavenworth, Kans., Kansas City, St. Joseph,[a] St. Louis, Mo.,[a] East St. Louis, Ill., and Coffeyville, Kans., these companies will pay the cost of transfer (and such other service performed by the elevator included in such charge) not to exceed three-quarters of 1 cent per 100 pounds, when the destination of such shipments is to a point on the Mississippi River and points west thereof taking the same rates, or beyond; to points in Arkansas, Louisiana, Texas, and Mexico, provided no previous payment for similar service at the same point has been made thereon; it being further understood that the allowance will run to elevator actually performing the service, regardless of the ownership of the grain or seed.

"NOTE.—The service for which this allowance is made is defined by the Interstate Commerce Commission as follows:

"As unloading grain from cars or grain-carrying vessels into a grain elevator and loading it out again after a period of not to exceed ten days, it does not include treatment or grading, cleaning, or clipping of grain; and retention in an elevator beyond ten days becomes storage and is not a part of the service of elevation as that word is used in the statute.

"Issued August 28, 1907. Effective October 1, 1907."

This tariff was afterwards corrected by the issue of Tariff 201–D, eliminating the last clause because "the first paragraph states specifically that the cost or the allowance that is made will not only pay for the cost of transfer, but for such other service as the elevator may render, for that price. Now, that service might include some of the functions that are stated in the last paragraph as not being within the meaning of that word allowance."

"No. 201–D is identical with No. 201–B with the exception of the last paragraph. That is eliminated."

(This tariff is not exactly identical, because it includes Council Bluffs, which was not mentioned in the former tariff.)

The term "or beyond" means "That where the St. Louis rate applies at a point, for instance, intermediate between Kansas City and St. Louis, then the allowance would be made, and "or beyond" means the business which, if you please, would come through St. Louis going to points beyond, for instance, like a shipment to Philadelphia, which passes over our rails to St. Louis."

"On grain that originates in Kansas, that goes through Coffeyville, to reach its destination the elevator allowance is made up to Coffey-

[a] Will only govern on shipments destined to Texas points.

ville." The elevator at Coffeyville substantially belongs to the Missouri Pacific, the publication is made to allow the payment by the railroad company, and the owner of the grain gets no benefit. Ten days' storage are allowed for the three-fourths of a cent, and if the grain remains over this limit an extra charge is made. Tariffs and practices are confined to meeting competitive conditions.

On grain from Coffeyville or Kansas City to Westwego an allowance is made, while no allowance is made on grain from St. Louis to Westwego, because the competitive conditions do not require it. The same condition exists with regard to grain to Bald Knob, Ark. The competitive condition is that the grain would otherwise go to other points. This might also apply to St. Louis.

179 Thinks Mr. Crosby's statement covers the case quite thoroughly. Experience is that the elevator allowance is not reflected into the country even when allowance was greater than it is now, which "is the statement made by the grain men, and then again that is verified by the fact that one day one market will make the price, and the next day another market will make the price." Then again, the freight rate to Chicago or the Mississippi River point does not always control the price of grain. There are other conditions that are incidental in the price of grain that frequently will control the value of the grain at St. Louis. So the value of the grain at St. Louis does not represent in all cases the freight charge added to the cost of the grain in the country. The market may be very much less relatively than that.

Would be glad to see the question of elevation absolutely eliminated. The elevation allowances which are paid by the railroads are caused by the allowances by the Union Pacific at Council Bluffs and Kansas City for the purpose of releasing their equipment.

If the Union Pacific were to discontinue the allowance and the Great Western were to continue granting free elevation, it would create a complication. Thinks it would be fair to have a reasonable price fixed for the service performed by a railroad elevator. The allowance of the Missouri Pacific is entirely on outgoing grain.

The three-fourths of a cent allowance at St. Louis on grain bound for Texas points would be paid on any grain shipped from St. Louis, whether from Kansas, Nebraska, or Illinois. Understands that an allowance is made by roads to southeastern points on grain brought in from markets east of the river. Would pay no allowance on grain from Coffeyville to Kansas City. Pays no allowance on Union Pacific grain. Does pay allowance on any grain that has not received an allowance, and a check is kept in Kansas City as to where grain came from. "There are a great many advantages which the railroads derive from employing elevators. Frequently cars are in bad order and have to be transferred; then again, cars are transferred for the purpose of consolidating and increasing the tonnage of outbound movements. When the consolidation arrangement was first inaugurated in Coffeyville and a record kept of the transfers, it showed the first six months saved about 14½ per cent in equipment

through the consolidation of loads, and that is a very desirable thing for a transportation company to get the benefit of."

Grain from Coffeyville goes mostly to Westwego for export which is 600 miles. Missouri Pacific prefers to have grain from Kansas go to southern destinations from Kansas City rather than have it hauled through to St. Louis. Have not as great assurance of getting grain out of St. Louis as Kansas City, for most of it goes to East St. Louis, and the cars leave the line of the Missouri Pacific. Missouri Pacific earns just the same amount either way.

Some of the elevators at Omaha are operated by grain dealers; the same is true of Atchison. At Leavenworth the elevator belongs to the railroad company. At Kansas City they pay all elevators the allowance, but the principal one used there belongs to the railroad company, and no allowance goes to the dealer. Ten days' storage is allowed, and a regular schedule of prices for handling grain is in force.

A man who is not engaged in the elevator business at Omaha and a man who is not engaged in that business at St. Louis are on a parity, except that the man in Omaha may pass his grain through the railroad elevator free of charge, and the man at St. Louis would have to pay an elevator, but this service is not the same so far as the railroad is concerned. Transfer by shovel, which was formerly used, was a very cumbersome process. It delayed the equipment both in and out bound.

Q. Is there any necessity for transfer at the Missouri River which does not exist here in St. Louis?

A. There is so far as our line is concerned.

Q. And why? State fully.

A. Because at Kansas City it is an intermediate market on our rails, and when we get to St. Louis we are through with it. The practice of the Missouri Pacific is to pay only one elevator allowance.

180 F. A. LELAND, assistant general freight agent Missouri, Kansas & Texas:

Missouri, Kansas & Texas pays allowance at both St. Louis and Kansas City. It is paid at St. Louis only to Texas and a few Louisiana points for the reason that rates from St. Louis to those points are the same as from Kansas City, and it is believed the shipper at St. Louis ought to be placed in a position to compete with the shipper at Kansas City. It makes no difference where the grain originates. Missouri, Kansas & Texas carries very little grain out of St. Louis to markets other than those in Texas, and that under rather unusual market conditions.

As to the adjustment of rates from points on lines in Kansas to Texas, the rates are adjusted substantially as testified by Mr. Crosby.

Would pay elevation charge at Kansas City even though grain was loaded out of an elevator at Kansas City.

Q. As I understand, a man could ship grain from Omaha, and then to St. Joe and Leavenworth, and get an elevation charge at each point. Could he do that?

A. I don't know; he could get the elevator charge from us after he gave us the grain, but would have to pay local rates from each point. These elevator allowances are made to meet competition.

Even if we paid on the inbound movement or reduced the rates from St. Louis to Arkansas points, it would not affect the situation so far as our railroad is concerned, and so far as the grain we handle out of St. Louis is concerned, for the reason that to the points that handle grain from St. Louis our rates are the same as from Kansas City, and necessarily the total charge from Kansas to Texas or other southern destinations is the amount from Kansas City to St. Louis greater than what the same would be if the grain moved from St. Louis to Texas.

If grain is carried to St. Louis as its destination, no allowance is made if it is shipped out of St. Louis over the Missouri, Kansas & Texas rails. All allowances for elevation at Kansas City or St. Louis are on outbound movements. Would be very glad to see allowance for elevation abolished.

In the event of a second allowance at Kansas City when grain is shipped from Omaha to Kansas City, it is made on the basis of the local rate from Kansas City to destination. Does not know of any elevation allowance on grain from Omaha to Kansas City. Does not pay elevation allowance if a similar allowance has been paid by any line at the same point. The allowance was made at St. Louis to Texas points to meet an allowance made at Kansas City by the Santa Fe and Rock Island.

The theory on which the allowance by the Rock Island or any other line is made at Kansas City or Omaha is, as witness understands it, "that unless the inbound line competing with the Union Pacific would make a similar allowance with the Union Pacific, grain which would pay a lesser charge would have some advantage in moving over other lines to Texas over the grain which might originate on the Burlington or Missouri Pacific or Rock Island in competition with the Union Pacific."

E. K. VOORHEES, general freight agent St. Louis & San Francisco Railroad Company:

The method of adjustment of rates on the Frisco are substantially the same as on the Burlington, Missouri Pacific, and Missouri, Kansas & Texas, but in southeastern Kansas rates to St. Louis are made lower than the combination on the Missouri River. Make allowance of three-fourths of a cent out of Kansas City on grain received from elevators and make no allowance on inbound movement. Grain consigned from Kansas points to St. Louis does not go through Kansas City except perhaps from some point near by.

Rules on the Frisco as to elevation are explained in Circular I. C. C. No. 5553.

181 Has lines leading southeast of St. Louis and pays three-fourths of a cent on grain out of St. Louis. The southeast territory is east of the main line of the Mobile & Ohio and south of the Memphis division of the Southern Railroad. The payment of allowance is result of competitive conditions, and the Frisco would be glad to take them out if it could do so and still do a fair share of the business. Other lines out of St. Louis pay the allowance. The allowance on southeastern territory has been made from Ohio River points, Louisville, Evansville, Cairo, and Memphis, for fifteen or twenty years, and some eight years ago it was extended to St. Louis. This allowance does not apply to Mississippi Valley points or Arkansas or Texas.

St. Louis & San Francisco Railroad Company tariff.—Item 31–c, effective August 24, 1907, in amendment No. 23 to I. C. C. No. 5553. (E–725, Reissue.) (Issued under special permission of I. S. C. C. No. 2588, dated August 15, 1907.)

In accordance with the authority of the Interstate Commerce Commission, in case No. 687, this company will pay at Kansas City, Mo.:

Three-fourths of 1 cent per 100 pounds on grain shipped over the St. Louis & San Francisco Railroad Company (except on grain destined Ashdown, Gravett, Ark.; Gulfton, Hume, Neosho, Mo.; Poteau and Westville, Ind. T., or grain which receives milling-in-transit privileges).

This sum will be paid to the elevator performing the service and will only be paid on presentation of evidence:

(1) That the transaction is in line with the ruling of the Interstate Commerce Commission.

(2) That no other payment of this character has been made.

(3) That the grain has been forwarded over the St. Louis & San Francisco Railroad Company.

No payment will be made where only a switching service is performed.

The term " Kansas City " is understood to include elevators located at Kansas City, Kans.; Armourdale, Kans.; Argentine, Kans.; Rosedale, Kans.; Turner, Kans.; Coburg, Mo., all of which are located in the Kansas City terminal district.

Effective August 1, 1907, in amendment No. 14 to I. C. C. 5553. (E–373, Reissue.)

On outbound shipments of corn products handled through warehouses or elevators on the Frisco tracks at Kansas City, Mo., or Rosedale, Kans., this company will assume transfer charge not to exceed $1.50 per car.

St. Louis & San Francisco Railroad Company tariff.—Item 42–B, effective October 21, 1907, in amendment No. 24 to I. C. C. No. 5553.

The St. Louis & San Francisco Railroad will join interested lines in absorbing elevation allowances shown below on revenue basis.

A. At Cairo, Ill.; Evansville, Ind.; Henderson, Louisville, and Uniontown, Ky.

On grain in carloads shipped to points in territory outlined below, three-fourths of 1 cent per 100 pounds to cover the cost of elevation at Cairo, Ill.; Louisville, Henderson, and Uniontown, Ky.; and Evansville, Ind., will be paid to shippers.

TERRITORY.

Points east of the Mobile & Ohio Railroad from Mobile, Ala., to Corinth, Miss. (not including Aberdeen or Columbus, Miss.), and on and south of the Southern Railway, Corinth, Miss. (but not including Corinth), to Chattanooga, Tenn., inclusive; also points shown in southeastern and Carolina territories as described in Joint Tariffs, 230 series (Current I. C. C. No. 5339) and 231 series (Current I. C. C. No. 4764).

B. Memphis, Tenn. Refer to Joint Tariffs Nos. 230 series (Current I. C. C. No. 5339), 761 series (Current I. C. C. No. 5340), 231 series (Current I. C. C. No. 4764), and 262 series (Current I. C. C. No. 4837), (to Carrollton Short Line Railway stations only), or subsequent issues, and note that rates named therein on grain carloads when destined southeastern and Carolina points, and Pensa-
182 cola, Fla., will include the payment to elevator, mill, or warehouse companies at Memphis, Tenn., of three-fourths of 1 cent per 100 pounds or grain for elevator, loading, or transfer charge.

The above allowance will be made only on grain handled through elevators or warehouses when the service is actually performed.

The Louisville & Nashville Railroad will participate in above charge on shipments to Pensacola, Fla.

C. At St. Louis, Mo., or East St. Louis, Ill., to southeastern territory.

Grain in carloads shipped from St. Louis or East St. Louis and consigned through to points of destination east of the line of the Mobile & Ohio Railroad, Corinth to Mobile (not including Aberdeen and Columbus, Miss.), on and south of the Memphis division of the Southern Railway, Corinth to Chattanooga (not including Corinth), east of the line of the Cincinnati, New Orleans and Texas Pacific Railroad, Chattanooga to Isham, and south of the southern boundary line of the States of Kentucy and Virginia, transferred through the elevators in St. Louis or East St. Louis, the maximum amount that will be paid by this company for transfer or elevation is three-fourths of 1 cent per 100 pounds, provided that no change of consignee or destination is made en route either at Ohio or Mississippi Rivers or south or east thereof, the amount allowed for transfer or elevation to be paid only on presentation of certificates of the elevators showing that the service was actually performed. (E 725 and 1312.)

H. GOWER, freight traffic manager of the Chicago, Rock Island & Pacific Railroad Company:

The Rock Island occupies substantially the same territory as that occupied by the other lines defendant to this petition. Situation as

to the payment of rates and elevation is substantially the same except those lines that pay out of St. Louis. Rock Island has no lines out of St. Louis to the Southeast or to Texas. Thinks testimony of Mr. Crosby covers entire lines of Rock Island. Would be glad to take out the allowances if possible. They are made because of competitive conditions. Rock Island would ignore the Union Pacific competition if other lines would. The effect of lowering the rate to St. Louis three-fourths of a cent would be that either Kansas commission would lower rates in Kansas or companies east of Missouri River having no rails west of the Missouri River would reduce the rates east of the river.

The Chicago Great Western, the Chicago, Milwaukee & St. Paul, and the Chicago & North Western have lines running east of the river and pay this elevation charge at Kansas City, but do not enter St. Louis.

W. S. WASHER, secretary and treasurer of the Washer Grain Company, Atchison, Kans.:

Owns and operates an elevator at Atchison; engaged in buying and selling grain at points in Kansas and Nebraska. In making purchases, bids are made conditional upon weights, grades, and inspection, and in order to ascertain the correct weight of grain it is necessary to elevate it at Atchison. Practically all purchases of grain are unloaded into the elevator at Atchison. It is part of the company's business to have the grain unloaded so as to inspect and know the grade of grain. Until recently did not receive elevator allowance, and during the time when not receiving it felt the competition of other Missouri River dealers who were having their grain handled free, because they were able to handle their grain to much better advantage. Practically all grain bought by the Washer Grain Company is on Atchison terms, which means Atchison weights and grades. So far as the shipper is concerned Atchison is the destination. Very little grain is received on consignment.

Sells grain at St. Louis, very largely in the South and Southeast, in Memphis, and at Gulf ports. Some is sold for export occasionally. Very little is sold at St. Louis and Chicago. Occasionally sell in Texas, but Southeast is the principal market.

183 Does not consider three-fourths of a cent a compensating allowance as compared with the free elevation of competitors. Does not consider that it pays the expense and interest on value of plant. Free elevation is allowed at Coffeyville and Leavenworth, Kans.

Would rather have free elevation than own an elevator and receive the three-fourths of a cent.

At the time the free elevation was allowed the grain of the Washer Grain Company had the same rates in the elevators at Kansas City as the grain of others, but this left nothing for the investment in the elevator.

Q. As a grain dealer without an elevator would you prefer free elevation, or would you prefer to pay three-quarters of a cent a hundred on your grain?

A. That would be immaterial to me so long as others in my line of business were on an equal basis.

If the elevator allowance and free elevation were discontinued, the price paid to the producer would be reduced.

BRUCE INMAN represents the Milliken Commission Company of St. Louis in purchasing grain in Nebraska and Iowa, with an office at Omaha: As no allowance is made at St. Louis this company is at a disadvantage in buying grain to the extent of the three-fourths of a cent, and the Omaha buyer can pay three-fourths of a cent more for grain in the country than this company can. It is the rule and practice at Omaha that grain received at that market shall be weighed and inspected there, which means the unloading of all cars. Has known of instances where Omaha dealers were bidding in the country just what they could sell for in the market, and the explanation would seem to be that they could make a little money out of the three-fourths of a cent elevation allowance. Grain is bought for this company on St. Louis weights and grades. Thinks there is little preference of producers for one market or the other on this account. Some prefer a market a little closer home. Grain is sent to both St. Louis and Omaha to be sold on commission.

Thinks that even if the cost of operating the elevator is three-fourths of a cent the Omaha dealer still has an advantage in that he has the elevator facilities for nothing. Thinks if dealer shipping grain to St. Louis gets a free elevator service in St. Louis, or gets three-fourths of a cent per 100, the position would be equal. Does not know anything about the allowance on grain going to the southeastern territory, as does not know anything about that end. The Milliken Helm Commission Company is in the elevator business.

GEORGE F. POWELL, grain dealer, St. Louis, Mo.: Buys grain in Nebraska for shipment to St. Louis. Comes in competition with Missouri River bidders and others. Missouri River dealers sell in the same markets with the St. Louis dealers, and any advantage they get at the river puts the St. Louis dealer to a corresponding disadvantage. Operates through the public elevators at St. Louis. Purchases on St. Louis weights and inspection, and in order to ascertain the weights the grain has to go into an elevator. Pays elevator company one-half cent a bushel, which covers ten days' storage. Railroads contribute nothing toward the expense in the elevator. Dealers at the river receive a contribution for the elevation of grain if it is handled through an elevator on outbound shipments. Does not buy grain at Kansas City and Omaha because the dealers there sell directly to the markets he wishes to sell to. Considers 1 cent a bushel a reasonable profit for handling grain. This is a fair net profit out of which is paid office and incidental expenses. Until

within the previous month was a regular bidder in Nebraska. Recently, because of bad car situation at St. Louis, has not been bidding.

The Missouri River dealer buys in competition with St. Louis dealers and also sells in competition with them, and has the advantage in buying and selling of the three-fourths of a cent. Sells largely in Cuba, exporting through Mobile, Ala. Rate from East St. Louis to Mobile is 12 cents per 100 on domestic business. On export business it is part of a through rate. No elevation is made on the export business. Does considerable business at Louisville, Ky., with grain dealers and gets no allowance on that. Meets competi-
184 tion of Missouri River dealers at Louisville and Cincinnati. Three-fourths of a cent practically pays the operation expenses of an elevator.

In speaking of no allowance being made to St. Louis, it was meant no allowance on the inbound movement.

Q. You spoke of a difference in price at the Missouri River, the inference being that that difference was occasioned entirely by the elevation charge. How do you account for the difference between Omaha and Kansas markets of a cent to a cent and a half a bushel?

A. Market conditions. There are other conditions besides the elevator allowance which have an effect on prices.

Q. The same thing would be true as to the market in St. Louis as compared with Kansas City. They are often entirely out of line on freight rates?

A. Yes; there are other conditions which affect the prices.

Dealers at St. Louis distribute grain to the Southeast, the Mississippi Valley, export considerable quantity to Cuba, and sell a good deal to the Southwest, principally Texas. The one-half of a cent charge at St. Louis includes just the transfer and ten days' storage.

M. W. Cochrane, the Cochrane Grain Company, of St. Louis: Engaged in buying and shipping grain at St. Louis; attempting to buy grain in Kansas, Nebraska, and Iowa, Nebraska especially. Sells grain largely to Cincinnati and Louisville, possibly three-fourths of the grain is sold to those markets. Receives no elevation allowance on grain to those markets. At those markets come in competition with Omaha grain buyers and buyers from other Missouri River points.

Attempts to get the virgin grain from farmers by purchasing at country stations. Handles grain through elevators at St. Louis. The rate to Louisville from Friend, Nebr., via Omaha and via St. Louis, is 22½ cents, and the Omaha man has the advantage over the St. Louis man through the elevator allowance, because at St. Louis the dealer has to pay one-half cent for elevation, which is paid for at the Missouri River by the railroads. Considers 1 cent a bushel a fair average profit for handling grain, over and above expenses. To meet the Omaha competition, St. Louis dealers will be fortunate to clear one-half a cent.

MARSHALL HALL, president of the W. L. Green Commission Company: Experience of the Green Commission Company has been substantially the same as that of Mr. Cochrane. Previously operated an elevator at St. Louis, but do not now. This was the Burlington elevator. At that time the railroads were making an elevation allowance of 1¼ cents per 100 pounds. While operating that elevator agreed or proposed to sell to an exporter of grain at the same price for which he purchased it on the floor at St. Louis, figuring on making a profit on the elevation allowed by the road.

Competes mostly with Omaha buyers for Omaha elevators. In the country Omaha buyers bid as high or higher than the St. Louis buyers and the St. Louis buyers have to pay more for the grain because the producer or shipper would rather sell to the Omaha house because he can get quicker returns and will not be out the use of his money so long. Missouri River markets have a natural advantage in location. Omaha dealer frequently offers grain for less than Green & Company are bidding in the country. Green Commission Company receive no allowance on grain forwarded to the Gulf ports. Have been unable to do export business because they can not meet the competition of Omaha and Kansas City. The elevation charge is one element that enters into the question, and another is the car situation at St. Louis, and the rate adjustment is in favor of Kansas City and Omaha, especially in southern Kansas.

The Missouri River shipper can ship his grain to New Orleans for export at three-quarters of a cent a hundred less than the St. Louis dealer. Green & Company only get in the market when they are willing to take a chance and buy grain, because they think they can sell it better, or at times when business is light they get favorable orders from some of their own customers. Missouri River dealers sell a great deal of grain for export through New York and Baltimore, while very little grain goes out of St. Louis to eastern destinations.

185 Green Commission Company comes into competition with buyers on the Missouri River in buying grain in Kansas and Nebraska.

"We have got to pay net to the grain shipper at least as much as he can obtain for his grain from the Missouri River dealer, and in addition to that we have got to pay the full rate from the point of origin to St. Louis, and in addition to that we have got to pay the elevator charge at St. Louis for handling our grain and transferring it into the cars where we have to ship it." The Missouri River dealer gets an allowance, which helps pay his elevator expenses. In actual result the Missouri River dealer pays three-fourths of a cent less than the tariff calls for in hauling grain to St. Louis.

In 1903 or 1904, or both, the Green Commission Company were operating the elevator at St. Louis. A great many times they sold grain on the floor of the exchange at St. Louis for what they paid for it, getting their profit from the elevation allowance. This was done when no more profitable business was offered. Mr. H. B. Richardson

is president of the Burlington elevator now. Mr. Hall was formerly an officer of that company.

Is opposed to the allowance because it nearly always is a source of discrimination. Would not be satisfied with an allowance of three-fourths of a cent on outgoing movements, because sometimes the orders are from St. Louis, and the Omaha men can "accumulate grain and sell it to our St. Louis industries against us." They accumulate the grain in elevators at Omaha on account of the allowance received from the railroads. St. Louis dealer could accumulate grain if he had the allowance.

Does not think the disadvantage to St. Louis grows out of location, but out of a disposition on the part of the railroads to favor one locality against another.

Omaha grain dealers are attempting to sell their grain to consumers in St. Louis in competition with St. Louis dealers. If the Omaha man sells grain to the Corn Products Company, for instance, they are able to have that grain transported from Omaha for 8 cents per 100 and get an allowance of three-fourths of a cent at Omaha, therefore the net charge for transportation is 7¼ cents, while when the St. Louis dealer brings the grain it costs him 8 cents and he receives no elevation allowance.

The Omaha dealer can make a product that the Corn Products Company would buy by mixing his grain through an elevator. Omaha dealers sell direct to industries in St. Louis frequently, and perhaps 50 per cent of the wheat for mills comes from Kansas City; is bought from Kansas City dealers. More grain for mills is bought from Kansas City dealers than St. Louis dealers.

All the grain that comes to St. Louis is not passed through the elevator. A large portion is loaded at the Missouri River and sold direct to destination, not going through an elevator. Probably all grain that is purchased in Nebraska and consigned to the company in St. Louis and sold in Louisville goes through an elevator. The Burlington Railroad will not allow their cars to be reloaded at the Burlington elevator, because eastern lines are short of cars, but is willing for their cars to run through to destination. In a good many instances cars go through. Specific quantities and grades can only be made up by reloading in an elevator. Sending the grain through the elevator is in the interest of the grain business, and not a transportation necessity, but can understand why a railroad would like to have its equipment released.

It is an advantage to an elevator to handle the grain through the elevator to make the grain conform to what the trade wants.

M. B. KOON,
FRANK HAGERMAN,
Solicitors for Complainants.
F. C. DILLARD,
Solicitor for Union Pacific Railroad Company.
ARBA S. VAN VALKENBURGH,
P. J. FARRELL,
Solicitors for Interstate Commerce Commission.

186 Afterwards, to wit, on the 31st day of January, 1910, the following order was filed and entered of record:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

HARRY J. DIFFENBAUGH ET AL., COMPLAINANTS, *vs.* INTERSTATE COMMERCE COMMISSION, DEFENDANT.	No. 3437. In Equity.

ORDER.

Now on this 24th day of January, 1910, this cause coming on to be heard, the Chicago & Alton Railroad Company, the Chicago Great Western Railroad Company, the Chicago, Milwaukee & St. Paul Railway Company, and the Wabash Railroad Company are permitted to file their motion and application to become complainants, and to file intervening petitions, in the above entitled cause, and their said motion and respective intervening petitions are presented and submitted to the court, and by the court taken under advisement.

(Signed) WALTER H. SANBORN,
(Signed) WILLIAM C. HOOK,
U. S. Circuit Judges.

187 Afterwards, to wit, on the 31st day of January, 1910, the motion of Chicago & Alton Railroad Co., et al., for leave to file intervening petitions was filed. Said motion is in words and figures as follows:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

HARRY J. DIFFENBAUGH ET AL., COMPLAINANTS,
vs.
INTERSTATE COMMERCE COMMISSION, DEFENDANT.

MOTION OF CHICAGO & ALTON RAILROAD COMPANY ET AL. FOR LEAVE TO FILE INTERVENING PETITIONS.

Now come the Chicago & Alton Railroad Company, the Chicago Great Western Railroad Company, the Chicago, Milwaukee & St. Paul Railway Company, and the Wabash Railroad Company, and move the court to grant said companies leave to become complainants in the above entitled cause, and to that end said railroad companies

respectively herewith present their intervening petitions, which they ask leave to file.

SCARRITT, SCARRITT & JONES,
Solicitors for Chicago & Alton R. R. Co.
JOHN BARTON PAYNE,
Solicitor for Chicago Great Western R. R. Co.
BURTON HANSON,
Solicitor for Chicago, Milwaukee & St. Paul Ry. Co.
J. L. MINNIS,
Solicitor for Wabash R. R. Co.

188 Afterwards, to wit, on the 3rd day of March, 1910, an intervening petition of the Wabash Railroad Company was filed. Said intervening petition is in words and figures as follows:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

HARRY J. DIFFENBAUGH ET AL., COMPLAINANTS,
vs.
INTERSTATE COMMERCE COMMISSION, DEFENDANT.

INTERVENING PETITION OF THE WABASH RAILROAD COMPANY.

To the honorable the judges of the Circuit Court of the United States for the Western Division of the Western District of Missouri:

Your petitioner, the Wabash Railroad Company, by leave of the court first had and obtained, files this its intervening petition in this cause and says:

First. That it is a corporation organized and existing under and by virtue of the laws of the States of Ohio, Michigan, Indiana, Illinois, and Missouri. That for many years last past it has owned and operated and now owns and operates approximately three thousand (3,000) miles of railway in the States of Ohio, Michigan, Indiana, Illinois, Missouri, and Iowa, its principal lines extending from the city of Toledo, in the State of Ohio, and the city of Buffalo, in the State of New York, to the cities of Council Bluffs, Iowa, and Omaha, Nebraska, and to Kansas City, Missouri. That its said lines of railway to Kansas City and Omaha terminate at those cities. That in the operation of its lines of railway your petitioner is constantly engaged in interstate commerce and a large part of its business consists in the movement of grain and grain products from the cities of Kansas City, Missouri, and Omaha, Nebraska, and Council Bluffs, Iowa, hereinafter referred to as the "Missouri River cities," eastwardly to the various markets of the United States lying east of the Missouri River and for export to foreign countries.

189 Second. Your petitioner hereby refers to the bill of complaint filed in this cause, and to each and every of the allega-

tions therein contained, and, except as hereinafter stated, hereby adopts and avers the same to be true and asks that said bill of complaint be considered a part of this petition.

Your petitioner avers that a reasonable compensation for elevating grain through elevators at said Missouri River cities, for transferring the same from the cars of one railway company to the cars of another railway company, and for weighing the same is not less than three-quarters of one cent per one hundred (100) pounds.

Your petitioner avers that it was not a party to the proceedings had upon the complaints filed with the Interstate Commerce Commission by the Traffic Bureau of the Merchants' Exchange of St. Louis, referred to and set out in the bill of complaint filed in this cause, but your petitioner did, after the order of the Interstate Commerce Commission was made in said cause, file therein its petition praying that it be permitted to intervene and be made a party defendant with permission to present its evidence in said cause, which prayer of your petitioner was by said commission thereafter denied.

Third. Your petitioner further avers that by reason of the peculiar circumstances and conditions surroundings the transportation of grain from the territory west of the Missouri River into and through the said Missouri River cities and by reason of the location of the transportation lines serving the said grain producing territory, all of which is fully set forth in the bill of complaint herein, the right and privilege of your petitioner to provide for the transfer and weighing of grain at said Missouri River cities is not only proper but absolutely necessary in order to afford to all producers and shippers of grain from said territory equal advantages in the marketing of their grain and to prevent unjust discriminations forbidden by law, in
190 this, to-wit: That if your petitioner is denied the right and privilege of providing for the transfer and weighing of said grain at elevators at the said Missouri River cities, as heretofore conducted, the shippers and producers of grain upon the lines of railroad having their eastern termini at the said cities will, in the shipment of grain to the various grain markets located east, north, and south of said cities, be compelled to pay large sums of money for the cost of transferring and weighing of the said grain at said cities, whereas the producers and shippers of grain located upon the lines of railroad extending through the said cities to the east, north, and south thereof will not be required to incur the extra cost and expense of such service and thereby will secure to themselves an undue advantage over all producers and shippers of grain similarly situated but not located on said lines extending through said Missouri River cities. And your petitioner further avers that other lines of railroad having their western termini at the said Missouri River cities have for many years last past owned, maintained, and operated and now own, maintain, and operate grain elevators at said cities, whereby said lines of railroad continuously furnished to the producers and shippers of grain over their respective lines of railway the said elevator facilities so owned by them for the purpose of transferring from car to car

the grain so shipped and for the purpose of weighing the same, all without charge.

Your petitioner further avers that to meet all such circumstances and conditions and in order to properly and efficiently handle the grain at said Missouri River cities, and to fully discharge its duty as a carrier your petitioner acquired by contract and by purchase large terminals at said cities and entered into certain contracts with third parties as the owners of certain grain elevators at said cities, whereby the said parties performed for your petitioner by means of said elevators the said service of transferring and weighing of the grain shipped from said cities over the line of your petitioner. That for many years your petitioner paid to said parties for per-
191 forming such service the sum of one and one-quarter cents per one hundred (100) pounds and later on paid the sum of three-quarter of one cent per one hundred (100) pounds for all grain that was transferred to the cars of your petitioner through the said elevators.

Your petitioner avers that its right and privilege of hiring the elevator service as aforesaid has resulted in a large saving to your petitioner in the cost of operation, and, as your petitioner believes, was satisfactory to all parties concerned. That the amounts which your petitioner has heretofore paid to said third parties for the operation of the said elevators for the purpose aforesaid, were the amounts fixed and prescribed by the Interstate Commerce Commission after formal hearing which involved the reasonableness of such charge, and your petitioner avers that the amounts so paid were no more than a just and reasonable charge for the service actually rendered. And your petitioner further avers that the payments so made by it for the elevator service aforesaid were not made necessary solely from the competitive condition created by any contract between any particular carrier and any particular elevator owner, but were then and are now made as an incident to the transportation of grain over its line of railroad.

Fourth. Your petitioner further avers that at other large and important grain markets located east of the Missouri River through which the line of railway of your petitioner runs your has acquired a large terminals at said cities and constructed therein large grain elevators at an expense of more than $200,000, which said elevators have been used by your petitioner in transferring and handling grain which has been delivered to it at said grain markets, and your petitioner avers that if it is prohibited from conducting the said elevators or operating them itself, and from transferring grain from foreign cars to its own cars through it without charge, that it will practically destroy the use and value of said terminal and elevator property, and if prohibited from hiring said elevator service at said Missouri River cities and at other grain markets located east of the Missouri
192 to and from which the railway line of your petitioner runs, such prohibition will cause to be diverted from your petitioner

the grain shipments which would be otherwise delivered to it in the due course of business at said Missouri River cities, and, at the other grain markets to the east thereof, and, as your petitioner is informed and verily believes, will practically destroy its business of receiving and shipping grain at all of said cities.

Fifth. Your petitioner avers that by a report of the Interstate Commerce Commission dated October 16th, 1908, in the matter of the Traffic Bureau of the Merchants' Exchange of St. Louis against the Chicago, Burlington and Quincy Railroad Company in the matter involving the allowance of elevator charges at Kansas City, St. Joseph, and Omaha and more fully set out in the bill of complaint in this cause, the Interstate Commerce Commission states that the principal of its decision in that matter applies everywhere, and that the commission expects that the decision will be universally accepted by carriers and the payment of said elevator allowances discontinued, and that if it turns out to be otherwise the commission will proceed in the most expeditious manner to enforce against all carriers its order made against the payment of such allowances.

Sixth. Your petitioner further avers that in order to preserve its property and its said terminals at said Missouri River cities and at the other grain markets to the east thereof, into and from which the line of your petitioner runs, and to retain its proper share of the grain shipments out of the said Missouri River cities over its line of railway and to provide for the economical and efficient handling and transfer of grain at all of said cities into its cars from the cars of other railway companies it is necessary to continue and it desires to continue as heretofore the payment of a reasonable allowance on all grain transferred through the elevators at the said Missouri River cities and at the other cities aforesaid.

Seventh. Your petitioner further avers that it has duly published and filed with the Interstate Commerce Commission its tariff schedules containing provision for the payments and allowances for the elevator service hereinabove mentioned.

193 Wherefore, your petitioner prays that it be made a party complainant to the aforesaid bill of complaint and that a temporary or interlocutory order be entered herein suspending the said order of the said commission and restraining the enforcement thereof by said commission and restraining said commission from taking any steps or instituting any proceedings to enforce the said order; and that upon a final hearing of this cause a decree be entered herein setting aside and annulling the said order of the commission, and perpetually enjoining said commission, its members, their agents, servants, and representatives, from enforcing said order and from taking any steps or instituting any proceedings for the enforcement of the same, and for such other and further relief in the premises as equity may require to your honors may seem meet.

And your petitioner will ever pray, etc.

J. L. MINNIS,
Solicitor for Intervener.

UNITED STATES OF AMERICA,
State of Missouri, City of St. Louis, ss:

E. B. Pryor, being first duly sworn, deposes and says that he is an officer of the above-named intervener, the Wabash Railroad Company, and as such is authorized to make this verification, and does make it for and on behalf of said intervener. That he has read the foregoing petition and knows the contents thereof, and that the same is true, except as to those matters therein stated to be upon information and belief, and as to those matters he believes it to be true.

E. B. PRYOR.

Subscribed and sworn before me, a notary public for the city of St. Louis, State of Missouri, this 31st day of March, A. D. 1909.

[SEAL.] LILLIAN F. BONVILLE,
Notary Public.

My commission expires July 13th, 1912.

Leave to file the above intervening petition is hereby granted.

———— ————, *Circuit Judge.*

194 Afterwards, to wit, on the 3rd day of March, 1910, an intervening petition of the Chicago Great Western Railroad Company was filed. Said intervening petition is in words and figures as follows:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

HARRY J. DIFFENBAUGH ET AL., COMPLAINANTS,
vs.
INTERSTATE COMMERCE COMMISSION, DEFENDANT.

INTERVENING PETITION OF CHICAGO GREAT WESTERN RAILROAD COMPANY.

To the honorable the judges of the Circuit Court of the United States for the Western Division of the Western District of Missouri:

Your petitioner, Chicago Great Western Railroad Company, by leave of court first had and obtained, files this intervening petition in this cause and says:

First. That the Chicago Great Western Railroad Company is a corporation organized and existing under and by virtue of the laws of the State of Illinois, with its principal office in the city of Chicago. That for many years last past its predecessor has owned and it now owns and operates about 1,500 miles of railway in the States of Illinois, Iowa, Minnesota, Missouri, Kansas, and Nebraska, its principal lines extending from the city of Chicago, Ill., to St. Joseph and Kansas City, Mo., and Kansas City, Kans., to Omaha, Nebr., and to St. Paul and Minneapolis, Minn.

Second. That its said lines of railway terminate, one at Chicago, one at Kansas City, one at St. Joe, one at Omaha, and the other

at Minneapolis. That, in the operation of its lines of railway, the Chicago Great Western Railroad Company constantly engaged in interstate commerce, and a large part of its business consisted in the movement of grain from the cities of St. Joseph, Kansas City, and Omaha, hereinafter referred to as the "Missouri River cities,"
195 eastwardly to the various markets of the United States lying east of the Missouri River, and for export to foreign countries.

Third. That a large part of the business of the railroad company has consisted in the movement of grain from the said Missouri River cities eastwardly and northerly to the various markets of the United States lying east of the Missouri River, and for export to foreign countries.

Fourth. Your petitioner hereby refers to the bill of complaint filed in this cause, and to each and every allegation therein contained, and, except as hereinafter stated, hereby adopts and avers the same to be true, and asks that said bill of complaint be considered a part of this petition.

Your petitioner avers that it was not a party to the proceedings had upon the complaint filed by the Interstate Commerce Commission by the Traffic Bureau of the Merchants Exchange of St. Louis, referred to and set out in the bill of complaint filed in this cause, but is injuriously affected thereby.

Your petitioner avers that a reasonable compensation for elevating grain through elevators at said Missouri River cities, for transferring the same from one railway company to another, and for weighing the same, is not less than three-fourths of one cent per one hundred pounds.

Fifth. Your petitioner further avers that by reason of the peculiar circumstances and conditions surrounding the transportation of grain from the territory west of the Missouri River into and through said Missouri River cities, and by reason of the location of the transportation lines serving the said grain producing territory, all of which is fully set forth in the bill of complaint herein, the right and privilege of your petitioner to provide for the transfer and weighing of grain in elevators at said Missouri River cities is not only proper, but absolutely necessary in order to afford to all producers and shippers of grain from said territory equal advantages in the marketing of their grain, and to prevent the unjust discriminations for-
196 bidden by law; that if your petitioner is denied the right and privilege of providing for the transfer and weighing of said grain at the said Missouri River cities, the shippers and producers of grain upon the lines of railway having their eastern termini at the said cities will, in the shipment of grain to the various grain markets located east, north, and south of said Missouri River cities, be compelled to pay large sums of money for the cost of transferring and weighing of the said grain at said cities, whereas the producers and shippers of grain located upon the lines of railroad extending through the said Missouri River cities to the east, north, and south thereof, will not be required to incur the extra cost and expense of

such service, and thereby will secure to themselves an undue advantage over all producers and shippers of grain similarly situated, but not located on such lines of railway extending through said Missouri River cities.

Sixth. Your petitioner avers that to meet the existing conditions and in order to properly and efficiently handle the grain business at said Missouri River cities, the Chicago Great Western Railroad Company acquired large terminals at each of said cities and constructed thereon at each of said cities a large grain elevator, all at an aggregate expense of about $1,000,000, and said properties are now of the reasonable value of $1,000,000, and are now owned by petitioner. Said terminal facilities and grain elevators have been and are now used by petitioner in transferring, weighing, and hauling grain which has been and is being delivered to it at said Missouri River cities for transportation over said lines of railway to points east, north, and south thereof.

Seventh. Your petitioner further avers that if it is prohibited from so conducting said elevators and from transferring grain from foreign cars to its own cars through said elevators without charge, that it will greatly damage the use and value of said elevator properties and terminal properties, and will divert the grain shipments which would be otherwise delivered to your petitioner in the due course of business at said Missouri River cities for shipment over said railway lines to the through railway lines at said Mis-
197 souri River cities; that is, railway lines originating at points west of the Missouri River and reaching markets east of the Missouri River, and, as your petitioner is informed and verily believes such prohibition will vitally affect injuriously the grain markets at Kansas City, St. Joseph, and Omaha, and other points in the Middle West.

Eighth. Your petitioner further avers that by a report and decision of the Interstate Commerce Commission, dated October 16th, 1908, in the matter of the traffic bureau of the Merchants' Exchange of St. Louis against the Chicago, Burlington & Quincy Railroad Company, in a matter involving the allowance of elevator charges at said Missouri River cities, and more fully set out in the bill of complaint in this cause, the Interstate Commerce Commission states that the principle of its decision in that matter applies everywhere, and that the commission expects that the decision will be universally accepted by carriers and the payment of said elevator allowances discontinued, and that if it turns out to be otherwise the commission will proceed in the most expeditious manner to enforce against all carriers its order made against the payment of such allowances.

Ninth. Your petitioner further avers that in order to preserve said elevator and terminal properties at said Missouri River cities, and to retain its proper share of the grain shipments out of said Missouri River cities over its lines of railway, and to provide for the economical and efficient transfer of grain and weighing of grain, it is necessary to continue, and it desires to continue, to transfer grain

to its cars from the cars of other railway companies and weigh such grain as may be delivered to it for such shipment as well as continue the payment of reasonable allowance for all such grain transferred through other elevators at said Misouri River cities.

Tenth. Your petitioner is advised and avers, upon information and belief, that more than ninety per cent of all the grain shipped into said Missouri River cities is shipped out to the various grain markets of the United States to the east, north, and south thereof, and
198 for export to foreign countries, and that under the rates for the movement of said grain which have been in existence for many years, and are still in force and effect, the said grain is mostly shipped from the said grain-producing territory west of the Missouri River into said Missouri River cities on the local rates from the originating points to said cities, and is thereafter shipped out from said cities to final destination on what is called proportional rates; that is, the balance of the through rate from said point of original to destination.

Wherefore your petitioner prays that it may be made a party complainant to the aforesaid bill of complaint and that a temporary or interlocutory order be entered herein suspending the said order of the commission and restraining the enforcement thereof by said commission, and restraining said commission from taking any steps or instituting any proceedings to enforce the said order; and that upon a final hearing of this cause a decree be entered herein setting aside and annulling the said order of the commission and perpetually enjoining said commission, its members, their agents, servants, and representatives, from enforcing said order and from taking any steps or instituting any proceedings for the enforcement of the same, and for such other and further relief in the premises as equity may require and to your honors may seem meet.

And your petitioners will ever pray, etc.

JOHN BARTON PAYNE,
Solicitor for Chicago Great Western Railroad Company.

199 STATE OF MISSOURI,
City of St. Louis, ss:

John Barton Payne, being first duly sworn, deposes and says that he is solicitor and ag[illegible] for the intervener above named; that he has read the foregoing pe[illegible]ion and knows the contents thereof, and that the same is true except as to those matters therein stated to be upon information and belief, and as to those matters he believes it to be true.

JOHN BARTON PAYNE.

Subscribed and sworn to before me this 24th day of January, A. D. 1910.

[SEAL.] JOHN D. JORDAN,
Clerk U. S. Circuit Court of Appeals, Eighth Circuit.

Leave to file the above intervening petition is hereby granted.

———— ————, *Circuit Judge.*

200 Afterwards, to wit, on the 3rd day of March, 1910, an intervening petition of the Chicago & Alton Railroad Company was filed. Said intervening petition is in words and figures as follows:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

HARRY J. DIFFENBAUGH ET AL., COMPLAINANTS,
vs.
INTERSTATE COMMERCE COMMISSION, DEFENDANT.

INTERVENING PETITION OF THE CHICAGO & ALTON RAILROAD COMPANY.

To the honorable the judges of the Circuit Court of the United States for the Western Division of the Western District of Missouri:

Your petitioner, the Chicago & Alton Railroad Company, by leave of court first had and obtained, files this intervening petition in this cause, and says:

First. That it is a corporation organized and existing under and by virtue of the laws of the State of Illinois, having its principal office in the city of Chicago, Illinois. That for many years last past it has owned and operated and now owns and operates approximately one thousand (1,000) miles of railway in the States of Illinois and Missouri, its principal line extending from the city of Chicago, Illinois, to Kansas City, Missouri, and from the city of Chicago, Illinois, to St. Louis, Missouri, and from St. Louis, Missouri, to Kansas City, Missouri. That in the operation of its lines of railway your petitioner is constantly engaged in interstate commerce, and a large part of its business consists in the movement of grain and grain products from the said city of Kansas City, hereinafter referred to as the "Missouri River city," eastwardly to the various markets of the United States lying east of the Missouri River and for export to foreign countries.

Second. Your petitioner hereby refers to the bill of complaint filed in this cause, and to each and every of the allegations therein contained, and, except as hereinafter stated, hereby adopts and avers the same to be true, and asks that said bill of complaint
201 be considered a part of this petition.

Your petitioner avers that it was not a party to the proceedings had upon the complaints filed with the Interstate Commerce Commission by the traffic bureau of the Merchants' Exchange of St. Louis, referred to and set out in the bill of complaint filed in this cause.

Your petitioner avers that a reasonable compensation for elevating grain through elevators at said Missouri River city, for transferring the same from one railway company to another, and for weighing the same is not less than three-quarters of one cent per one hundred (100) pounds.

Third. Your petitioner further avers that by reason of the peculiar circumstances and conditions surrounding the transportation of grain from the territory west of the Missouri River into and through the said Missouri River city, and by reason of the location of the transportation lines serving the said grain-producing territory, all of which is fully set forth in the bill of complaint herein, the right and privilege of your petitioner to provide for the transfer and weighing of grain at said Missouri River city is not only proper, but absolutely necessary in order to afford to all producers and shippers of grain from the said territory equal advantages in the marketing of their grain, and to prevent the unjust discriminations forbidden by law, in this, to wit: That if your petitioner is denied the right and privilege of providing for the transfer and weighing of said grain at elevators at the said Missouri River city, as heretofore conducted, the shippers and producers of grain upon the lines of railroad having their eastern termini at the said city's will, in the shipment of grain to the various grain markets located east, north, and south of said city be compelled to pay large sums of money for the cost of transferring and weighing of the said grain at said city, whereas the producers and shippers of grain located upon the lines of railroad extending through the said city to the east, north, and south thereof, will not be required to incur the extra cost and expense of such service, and thereby will secure to themselves an undue advantage over all
202 producers and shippers of grain similarly situated, but not located on said lines extending through said Missouri River city. And your petitioner further avers that to meet such circumstances and conditions, and in order to properly and efficiently handle the grain business at Kansas City, it acquired large terminals at that place, and arranged with third persons owning grain elevators to transfer and handle grain which had been delivered to your petitioner at Kansas City for transportation over its lines of railway to points east thereof. That by this arrangement with said third persons operating said elevators payment was made to such third persons of one and one-quarter cents per one hundred (100) pounds. Subsequently this payment was reduced to three-quarters of one cent per one hundred (100) pounds for all grain transferred through said elevators. The amounts which your petitioner has heretofore paid to said third persons operating said elevators were the amounts fixed and prescribed by the Interstate Commerce Commission after formal hearings; that said amounts are in themselves reasonable; and your petitioner further avers that the amounts so paid were at no time more than a just and reasonable charge for the service actually rendered to your petitioner.

Fourth. Your petitioner avers that if it is prohibited from so conducting said elevators, and from transferring grain from foreign cars to its own cars through them without charge, that it will practically destroy the use and value of said elevator properties, and will divert the grain shipments, which would be delivered to it in the due course of business at Kansas City for shipment over its lines, to the

through lines at Kansas City—that is, lines originating at points west of the Missouri River and reaching markets east of the Missouri River—and, as your petitioner is informed and verily believes, will practically destroy the business of receiving and shipping grain at Kansas City.

Fifth. Your petitioner further avers that by a report of the Interstate Commerce Commission, dated October 16th, 1908, in
203 the matter of the traffic bureau of the Merchants' Exchange of St. Louis against the Chicago, Burlington & Quincy Railroad Company, in a matter involving the allowance of elevator charges at Kansas City, St. Joseph, and Omaha, and more fully set out in the bill of complaint in this cause, the Interstate Commerce Commission states that the principle of its decision in that matter applies everywhere, and that the commission expects that the decision will be universally accepted by carriers and the payment of said elevator allowances discontinued, and that if it turns out to be otherwise the commission will proceed in the most expeditious manner to enforce against all carriers its order made against the payment of such allowances.

Sixth. Your petitioner further avers that in order to retain its proper share of the grain shipments out of Kansas City over its said lines of railway, and to provide for the economical and efficient handling and transfer of grain at said city to its cars from the cars of other railway companies, it is necessary to continue, and it desires to continue as heretofore, the payment of a reasonable allowance for all grain transferred through its said elevators at said Kansas City.

Wherefore your petitioner prays that it may be made a party complainant to the aforesaid bill of complaint, and that a temporary or interlocutory order be entered herein suspending the said order of the commission and restraining the enforcement thereof by said commission, and restraining said commission from taking any steps or instituting any proceedings to enforce the said order; and that, upon a final hearing of this cause, a decree be entered herein setting aside and annulling the said order of the commission, and perpetually enjoining said commission, its members, their agents, servants, and representatives, from enforcing said order and from taking any steps or instituting any proceedings for the enforcement of the same, and for such other and further relief in the premises as equity may require and to your honors may seem meet.

204 And your petitioner will ever pray, etc.

SCARRITT, SCARRITT & JONES,
Solicitors for said Intervenor,
Chicago & Alton Railroad Company.

E. L. SCARRITT,
Of Counsel.

UNITED STATES OF AMERICA,

State of Illinois, County of Cook, ss:

C. A. King, being first duly sworn, deposes and says that he is an officer of the above-named intervenor, Chicago & Alton Railroad Company, and as such is authorized to make this verification, and does make it for and on behalf of said intervenor; that he has read the foregoing petition and knows the contents thereof, and that the same is true, except as to those matters therein stated to be upon information and belief, and as to those matters he believes it to be true.

C. A. KING.

Subscribed and sworn to before me, a notary public in and for the county of Cook and State of Illinois, this 1st day of April, A. D. 1909.

[SEAL.] GERRARD B. WINSTON,
Notary Public.

Leave to file the above intervening petition is hereby granted.

———— ————, *Circuit Judge.*

205 Afterwards, to wit, on the 3rd day of March, 1910, the intervening petition of Chicago, Milwaukee & St. Paul Railway Co. was filed. Said intervening petition is in words and figures as follows:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

HARRY J. DIFFENBAUGH ET AL., COMPLAINANTS,

vs.

INTERSTATE COMMERCE COMMISSION, DEFENDANT.

INTERVENING PETITION OF THE CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY.

To the honorable the judges of the Circuit Court of the United States for the Western Division of the Western District of Missouri:

Your petitioner, the Chicago, Milwaukee & St. Paul Railway Company, by leave of court first had and obtained, files this intervening petition in this cause and says:

First. That it is a corporation organized and existing under and by virtue of the laws of the State of Wisconsin, having its principal office in the city of Milwaukee, Wisconsin. That for many years last past it has owned and operated, and now owns and operates, more than seven thousand (7,000) miles of railway in the States of Wisconsin, Illinois, Michigan, Iowa, Minnesota, North and South Dakota, and Missouri, its principal lines extending from the city of Chicago, Illinois, to Kansas City, Missouri, to Omaha, Nebraska, to Sioux City, Iowa, and to St. Paul and Minneapolis, Minnesota, and thence westerly to the Missouri River. That its said lines of rail-

way to Kansas City and Omaha terminate at those cities. That in the operation of its lines of railway your petitioner is constantly engaged in interstate commerce, and a large part of its business consists in the movement of grain and grain products from the said cities of Kansas City and Omaha, hereinafter referred to as the "Missouri River cities," eastwardly to the various markets of the United States lying east of the Missouri River and for export to foreign countries.

206 Second. Your petitioner hereby refers to the bill of complaint filed in this cause, and to each and every of the allegations therein contained, and, except as hereinafter stated, hereby adopts and avers the same to be true, and asks that said bill of complaint be considered a part of this petition.

Your petitioner avers that it was not a party to the proceedings had upon the complaints filed with the Interstate Commerce Commission by the traffic bureau of the Merchants' Exchange of St. Louis, referred to and set out in the bill of complaint filed in this cause.

Your petitioner avers that a reasonable compensation for elevating grain through elevators at said Missouri River cities, for transferring the same from one railway company to another, and for weighing the same is not less than three-quarters of one cent per one hundred (100) pounds.

Third. Your petitioner further avers that by reason of the peculiar circumstances and conditions surrounding the transportation of grain from the territory west of the Missouri River into and through the said Missouri River cities, and by reason of the location of the transportation lines serving the said grain producing territory, all of which is fully set forth in the bill of complaint herein, the right and privilege of your petitioner to provide for the transfer and weighing of grain at said Missouri River cities is not only proper but absolutely necessary in order to afford to all producers and shippers of grain from the said territory equal advantages in the marketing of their grain, and to prevent the unjust discriminations forbidded by law, in this, towit: That if your petitioner is denied the right and privilege of providing for the transfer and weighing of said grain at elevators at the said Missouri River cities, as heretofore conducted, the shippers and producers of grain upon the lines of railroad having their eastern termini at the said cities will, in the shipment of grain

207 to the various grain markets located east, north, and south of said cities, be compelled to bear the cost of transferring and weighing of the said grain at said cities, whereas the producers and shippers of grain located upon the lines of railroad extending through the said cities to the east, north, and south thereof will not be required to incur the extra cost and expense of such service, and thereby will secure to themselves an undue advantage over all producers and shippers of grain similarly situated but not located on said lines extending through said Missouri River cities. And your petitioner further avers that to meet such circumstances

and conditions, and in order to properly and efficiently handle the grain business at Kansas City, it acquired large terminals at that place and constructed thereon a large grain elevator and grain storage tanks at an expense of more than three hundred thousand dollars ($300,000.00), which said terminal facilities and grain elevator have been used by your petitioner in transferring and handling grain which has been delivered to it at said Kansas City for transportation over its lines of railway to points east, north, and south thereof. That for some years your petitioner operated said elevator itself and at its own cost and expense in transferring grain through the same. That such operation resulted in a loss to your petitioner, and because thereof it made arrangements with a third party to operate the same on the payment of at first one and a quarter cents (.01–1/4) per hundred (100) pounds, and later on for three-quarters of one cent (.00–3/4) per hundred (100) pounds for all grain that was transferred through said elevator.

Your petitioner avers that the operation of said elevator by said third party resulted in a large saving to your petitioner in the cost of operation, and was in every way more satisfactory to all concerned. That the amounts which your petitioner has heretofore paid to said third party for the operation of said elevator were the amounts fixed and prescribed by the Interstate Commerce Commission after formal hearings, which involved the reasonableness of such charge, and your petitioner avers that the amounts so paid were no more than a just and reasonable charge for the services actually rendered.

208 Fourth. Your petitioner avers that if it is prohibited from so conducting said elevator or operating it itself, and from transferring grain from foreign cars to its own cars through it without charge, that it will practically destroy the use and value of said elevator property, and will divert the grain shipments which would be delivered to it in the due course of business at Kansas City, for shipment over its lines, to the through lines at Kansas City, that is, lines originating at points west of the Missouri River and reaching markets east of the Missouri River, and, as your petitioner is informed and verily believes, will practically destroy the business of receiving and shipping grain at Kansas City.

Fifth. Your petitioner further avers that by a report of the Interstate Commerce Commission, dated October 16th, 1908, in the matter of the Traffic Bureau of the Merchants' Exchange of St. Louis against the Chicago, Burlington & Quincy Railroad Company, in a matter involving the allowance of elevator charges at Kansas City, St. Joseph, and Omaha, and more fully set out in the bill of complaint in this cause, the Interstate Commerce Commission states that the principle of its decision in that matter applies everywhere, and that the commission expects that the decision will be universally accepted by carriers and the payment of said elevator allowances discontinued, and that if it turns out to be otherwise the commission will proceed in the most expeditious manner to enforce against all carriers its order made against the payment of such allowances.

Sixth. Your petitioner further avers that in order to preserve its property at its said terminals at Kansas City, as aforesaid, and to retain its proper share of the grain shipments out of Kansas City and Omaha and Council Bluffs over its said lines of railway, and to provide for the economical and efficient handling and transfer of grain at said cities to its cars from the cars of other railway companies, it is necessary to continue, and it desires to continue, as heretofore, the payment of a reasonable allowance for all grain transferred through its said elevator at said Kansas City and the other elevators at said Missouri River cities.

Wherefore your petitioner prays that it may be made a party complainant to the aforesaid bill of complaint, and that a
209 temporary or interlocutory order be entered herein suspending the said order of the commission and restraining the enforcement thereof by said commission, and restraining said commission from taking any steps or instituting any proceedings to enforce the said order; and that, upon a final hearing of this cause, a decree be entered herein setting aside and annulling the said order of the commission, and perpetually enjoining said commission, its members, their agents, servants, and representatives, from enforcing said order and from taking any steps or instituting any proceedings for the enforcement of the same, and for such other and further relief in the premises as equity may require and to your honors may seem meet.

And your petitioner will ever pray, etc.

BURTON HANSON,
Solicitor for said Intervenor,
Chicago, Milwaukee & St. Paul Railway Company.

UNITED STATES OF AMERICA,
State of Illinois, County of Cook, ss:

E. W. McKenna, being first duly sworn, deposes and says that he is an officer of the above-named intervenor, Chicago, Milwaukee & St. Paul Railway Company, and as such is authorized to make this verification, and does make it for and on behalf of said intervenor. That he has read the foregoing petition and knows the contents thereof, and that the same is true, except as to those matters therein stated to be upon information and belief, and as to those matters he believes it to be true.

E. W. MCKENNA.

Subscribed and sworn to before me, a notary public in and for the county of Cook and State of Illinois, this 24th day of March, A. D. 1909.

[SEAL.] W. D. MILLARD, *Notary Public.*

My commission expires May 11th, A. D. 1912.

Leave to file the above intervening petition is hereby granted.

———— ————, *Circuit Judge.*

210 Afterwards, to wit, on the 15th day of April, 1910, an exhibit was filed. Said exhibit is in words and figures as follows, to wit:

Edward A. Moseley, Secretary.

INTERSTATE COMMERCE COMMISSION,

OFFICE OF THE SECRETARY,

WASHINGTON.

I, Edward A. Moseley, secretary of the Interstate Commerce Commission, do hereby certify that the sheet hereto attached contained a true and correct extract from Supplement No. 69 to St. Louis & San Francisco Railroad Company Freight Tariff I. C. C. No. 5553, filed with the said Interstate Commerce Commission on July 20, 1909.

In witness whereof I have hereunto set my hand and affixed the seal of said commission this 4th day of December, A. D. 1909.

[SEAL.] EDW. A. MOSELEY,

Secretary of the Interstate Commerce Commission.

211 [Extract from Supplement No. 69 to St. Louis & San Francisco Railroad Co. Freight Tariff I. C. C. No. 5553, filed on July 20, 1909.]

Page 5.

SECTION 2—Continued.

Milling in transit and special rules.

Item No.	Subject.	Instructions.
		Reissue; effective July 14, 1909, in Supplement No. 65.
31-H cancels 31-G.	Absorption of transfer charges on grain and corn products handled through elevators at Kansas City, Mo., and Rosedale, Kans.	In accordance with the authority of the Interstate Commerce Commission, in case No. 687, this company will pay at Kansas City, Mo.— Three-fourths of one cent per 100 lbs. on grain and seeds shipped over the St. Louis & San Francisco Railroad Company. This sum will be paid to the elevator performing the service and will only be paid on presentation of evidence: (1) That the transaction is in line with the ruling of the Interstate Commerce Commission. (2) That no other payment of this character has been made. (3) That the grain and seeds have been forwarded over the St. Louis & San Francisco Railroad Co. No payment will be made where only a switching service is performed. The term Kansas City is understood to include elevators located at Kansas City, Kans., Armourdale, Kans., Argentine, Kans., Rosedale, Kans., Turner, Kans., Coburg, Mo., Harlem, Mo., all of which are located in the Kansas City terminal district.

212 Afterwards, to-wit, on the 15th day of April, 1910, an exhibit was filed. Said exhibit is in words and figures as follows, to-wit:

Edward A. Moseley, Secretary.

INTERSTATE COMMERCE COMMISSION.

OFFICE OF THE SECRETARY.

WASHINGTON.

I, Edward A. Moseley, secretary of the Interstate Commerce Commission, do hereby certify that the documents hereto attached are true copies of schedules more particularly hereinafter described, filed with the said Interstate Commerce Commission on dates specified below, to-wit:

Chicago, Rock Island & Pacific Railway No. 23267–B, I. C. C. No. C–8489, filed on May 19, 1908.

Chicago, Rock Island & Pacific Railway, I. C. C. No. C–8488, filed on May 19, 1908.

Chicago, Burlington & Quincy Railroad Co., I. C. C. No. 9277, filed on December 1, 1908.

Chicago, Burlington & Quincy Railroad Company, I. C. C. No. 9275, filed on December 1, 1908.

Chicago, Burlington & Quincy Railroad Company, I. C. C. No. 9276, filed on December 1, 1908.

Union Pacific Railway Company Circular G. F. O. No. 933, I. C. C. No. 2207, filed on October 24, 1908.

Missouri, Kansas & Texas Railway Company Freight Tariff, I. C. C. No. A–3248, filed on June 17, 1909.

The Missouri Pacific Railway Company Freight Tariff, I. C. C. No. A–1050, filed on June 25, 1909.

The Missouri Pacific Railway Company Freight Tariff, I. C. C. No. A–1284, filed on November 17, 1909.

Missouri, Kansas & Texas Ry. Co. Freight Tariff, I. C. C.
213 No. A–3327, filed on November 5, 1909.

In witness whereof I have hereunto set my hand and affixed the seal of said commission this 4th day of December, A. D. 1909.

[SEAL.] EDW. A. MOSELEY,
Secretary of the Interstate Commerce Commission.

214 No supplement will be issued to this publication.

I. C. C. No. C–8489
Cancels I. C. C. No. C–8456.

ROCK ISLAND

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY

C., R. I. & P. No. 23267–B

(Cancels No. 23267–A)

Issued May 18, 1908. Effective June 27, 1908.

In accordance with the authority of the Interstate Commerce Commission in case No. 687, this company will pay at Leavenworth, Kas., Atchison, Kas., Elwood, Kas., and St. Joseph, Mo.,

Three-fourths of one cent per 100 pounds on grain or seeds, carloads, shipped over the Chicago, Rock Island & Pacific Railway.

This sum will be paid to the elevator performing the service and will only be paid on presentation of evidence:

(1) That the transaction is in line with the ruling of the Interstate Commerce Commission.

(2) That no other payment of this character has been made.

(3) That the grain or seeds have been forwarded over the Chicago, Rock Island & Pacific Railway.

No payment will be made where only a switching service is performed.

H. GOWER,
F. T. M. Rock Island Lines, Chicago, Ill.
H. H. EMBRY,
G. F. A. C., R. I. & P. Ry., Kansas City, Mo.
T. H. SIMMONS,
G. F. A. C., R. I. & P. Ry., Chicago, Ill.

Issued by F. J. Shubert, A. G. F. A. C., R. I. & P. Ry., Chicago, Ill.

2000 O (C. F. No. 8683)

215 C., B. & Q. I. C. C. No. 9277.
Supersedes I. C. C. No. 9218.

No supplement other than cancellation will be issued to this tariff.

C., B. & Q. G. F. O. No. 1999-G.
Supersedes G. F. O. No. 1999-F.

Quincy Route Tariff No. 1237-E.
Supersedes Tariff No. 1237-D.

Burlington Route. Chicago, Burlington & Quincy Railroad Co. Quincy, Omaha & Kansas City R. R. (FX-5 No. 23). Allowance for Transfer of Grain and Seeds. Taking Effect January 1, 1909. Account Postponement of Order of Interstate Commerce Commission in Case No. 1230 et al., Dated November 25, 1908.

On grain and seeds shipped via the Chicago, Burlington & Quincy Railroad, or Quincy, Omaha & Kansas City R. R., transferred through elevators at points named in list below, these companies will pay cost of transfer and such service as elevator doing the transfer includes in that service, not to exceed three-quarters (3/4) of one cent per 100 pounds, when destination is point on the Mississippi River (or points west thereof taking same rates) or beyond.

Transfer points above referred to.

Council Bluffs ---- Iowa	St. Joseph ---------- Mo.	Nebraska City ---- Neb.
Omaha ---------- Neb.	Atchison ---------- Kas.	Rulo ---------- "
South Omaha ------ "	Leavenworth ------ "	Lincoln ---------- "
Kansas City ------ Mo.	Elwood ---------- "	

Same allowance will be made at Omaha or South Omaha, Neb., Nebraska City, Neb., or Council Bluffs, Iowa, on grain or seeds which are transferred through elevators at points named and pay the C., B. & Q. R. R. the local or proportional rates from these points, where destination is St. Joseph, Mo., Atchison, Kas., Leavenworth, Kas., Kansas City, Mo., or points beyond.

Payment will be made only to elevators actually performing the service, regardless of the ownership of the grain or seeds.

216 No payment will be made where a similar payment has been or will be made on the same grain or seeds.

Issued November 30, 1908, by W. B. Hamblin, general freight agent C., B. & Q. R. R. Co., Illinois and Iowa districts, Chicago, Ill.; W. Gray, general freight agent C., B. & Q. R. R. Co., Missouri district, St. Louis, Mo.; Geo. H. Crosby, freight traffic manager, C., B. & Q. R. R. Co., Chicago, Ill.; C. E. Spens, general freight agent C., B. & Q. R. R. Co., lines west of Missouri River, Omaha, Neb.

(C., B. & Q. File No. 50451.) (T. D. 408.

A. E. C. (H. P. Co–1000–B 6907.)

217 No supplement will be issued to this publication. I. C. C. No. C–8488. (Cancels I. C. C. No. C–8463.)

ROCK ISLAND.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY.

C., R. I. & P. No. 23266–C (Cancels No. 23266–B).

Issued May 18, 1909. Effective June 27, 1908.

In accordance with the authority of the Interstate Commerce Commission, in case No. 687, this company will pay at Kansas City, Mo.; Omaha, South Omaha, Neb.; and Council Bluffs, Iowa.

Three-fourths of one cent per 100 pounds on grain or seeds, carloads, shipped over the Chicago, Rock Island & Pacific Railway and the St. Louis, Kansas City & Colorado Railroad.

This sum will be paid to the elevator performing the service and will only be paid on presentation of evidence:

(1) That the transaction is in line with the ruling of the Interstate Commerce Commission.

(2) That no other payment of this character has been made.

(3) That the grain or seeds have been forwarded over either the Chicago, Rock Island & Pacific Railway or the St. Louis, Kansas City & Colorado Railroad.

No payment will be made where only a switching service is performed.

The term Kansas City is understood to include elevators located at Kansas City, Kas.; Armourdale, Kas.; Argentine, Kas.; Rosedale, Kas.; Turner, Kas.; and Coburg, Mo., all of which are located in the Kansas City terminal district.

Issued by F. J. Shubert, A. G. F. A., C. R. I. & P. R'y, Chicago, Ill.

218

H. GOWER,
F. T. M., Rock Island Lines,
Chicago, Ill.
H. H. EMBRY,
G. F. A., C. R. I. & P. R'y.,
Kansas City, Mo.
T. H. SIMMONS,
G. F. A., C. R. I. & P. R'y.,
Chicago, Ill.

219 No supplement other than cancellation will be issued to this tariff.

C. B. & Q. I. C. C. No. 9275
Supersedes I. C. C. No. 9233.

C. B. & Q. G. F. O. No. 2545–E,
Supersedes G. F. O. No. 2545–D.

Burlington Route.

Chicago, Burlington & Quincy Railroad Co.

Missouri, Kansas & Texas Railway (FX–4 No. 12).

Missouri, Kansas & Texas Railway of Texas (FX–4 No. 12).

Allowance for grain transfer.

Taking effect January 1, 1909.

Account postponement of order of Interstate Commerce Commission in case No. 1239 et al., dated November 25, 1908.

On shipments of grain and seeds shipped via the Chicago, Burlington & Quincy R. R., Kansas City, Mo., and Missouri, Kansas & Texas Ry., or its connections, and transferred through elevator at St. Joseph, Mo., Atchison, Leavenworth, or Elwood, Kas., the companies named will pay cost of transfer (and such service as elevator doing the transfer includes in charge) not to exceed three-quarters (¾) of one cent per 100 pounds when destination of shipments is points in Texas or Louisiana or competitive points in Missouri, Kansas, Indian Territory, or Oklahoma, named in following joint tariffs or subsequent issues:

Tariffs.

	I. C. C. No.	C., B. & Q., G. F. O. No.
F. A. Leland's Texas Tariff No. 32-G	512	2643-B (Texas).
F. A. Leland's S. W. L. Tariff No. 47	534	4229-A (Louisiana).
M. K. & T. No. 4106	A-3127	1309-G (New Orleans, etc.).
" 4096	A-3125	267-B (Mo., Kas., Ind. Ter. & Ok., etc.).
" 3712-F	A-2969	1043-D (Galveston, export).

Payment will be made only to elevators actually performing the service, regardless of ownership of the grain or seed.

No payment will be made where a similar payment has been made on the same grain or seeds at same point by some other carrier.

220 Divides as per division sheet No. 1 for tariff.

Issued November 30, 1908, by W. B. Hamblin, general freight agent, C. B. & Q. R. R. Co., Illinois and Iowa Districts, Chicago, Ill.; W. Gray, general freight agent, C. B. & Q. R. R. Co., Missouri District, St. Louis, Mo.; Geo. H. Crosby, freight traffic manager, C. B. & Q. R. R. Co., Chicago, Ill.; C. E. Spens, general freight agent, C. B. & Q. R. R. Co., Lines West of Missouri River, Omaha, Neb. (C. B. & Q. file No. 50449.)

T. D. 408.

221 No supplement other than cancellation will be issued to this tariff.

C. B. & Q. I. C. C. No. 9276
Supersedes I. C. C. No. 9232.

C. B. & Q. G. F. O. No. 2563-F.
Supersedes G. F. O. No. 2563-E.

Burlington Route.

Chicago, Burlington & Quincy Railroad Co.

Kansas City Southern Railway. (FX-4, No. 35.)

Allowance for grain transfer.

Taking effect January 1, 1909.

Account postponement of order of Interstate Commerce Commission in case No. 1239 et al., dated November 25, 1908.

On shipments of grain and seeds shipped via the Chicago, Burlington & Quincy R. R., Kansas City, Mo., and Kansas City Southern Railroad or its connections, and transferred through elevator at St. Joseph, Mo., Atchison, Leavenworth or Elwood, Kan., the companies named will pay cost of transfer (and such service as elevator doing the transfer includes in charge) not to exceed three-quarters (¾)

of one cent per 100 pounds when destined to points to which rates are named in following joint tariffs or subsequent issues:

Tariffs.

	I. C. C. No.	C. B. & Q. G. F. O. No.
F. A. Leland's Texas Tariff No. 32-G	[1] 512	2643-B (Texas).
F. A. Leland's S. W. L. Tariff No. 47	534	4229-A (Louisiana).
K. C. S. No. 1393-D	2185	1249-B (Arkansas, etc.).
" 1491-D	2186	1245-B (Arkansas, etc.).
" [2] 1	2188	1368-A (K. C. S. points).
" 810-D	2149	1247-A (Ft. Smith, Ark.).
" 49-A	2321	2181-B (Ft. S. & W. Ry., etc.).
" 36-A	2281	1242-D (Shreveport, etc.).
" 2154	2369	3746-A (Texarkana).

[1] Will not govern on shipments to local points on Texarkana & Ft. Smith Ry.
[2] Governs in connection with Tariff No. 1 or subsequent issues only when to junction points as named in same.

Payment will be made only to elevators actually performing the service, regardless of ownership of the grain or seed.

No payment will be made where a similar payment has been made on same grain or seeds at same point by some other carrier.

Divides as per division sheet No. 1 for tariff.

222 Issued November 30, 1908, by W. B. Hamblin, general freight agent C. B. & Q. R. R. Co., Illinois and Iowa Districts, Chicago, Ill.; W. Gray, general freight agent, C. B. & Q. R. R. Co., Missouri District, St Louis, Mo.; Geo. H. Crosby, freight traffic manager, C. B. & Q. R. R. Co., Chicago, Ill.; C. E. Spens, general freight agent, C. B. & Q. R. R. Co., lines west of Missouri River, Omaha, Neb.
(C. B. & Q. file No. 50450.) T. D. No. 408.

223 I. C. C. No. 2207
Cancels No. 2189
In lieu of I. C. C. No. 2189 rejected by Interstate Commerce Commission

Circular G. F. O. No. 933.
Cancels No. 929.

Union Pacific Railroad Company.

Allowance to elevators located at Council Bluffs, Ia., and Kansas City, Kan., for transferring grain to secure prompt release of cars.

To expedite the movement and to secure the prompt release and return of equipment, an allowance of three-fourths of one cent per 100 pounds will be made by the Union Pacific R. R. to the elevators performing the service on grain, in carloads, transferred by the elevators at the termini and upon the tracks of the Union Pacific

R. R. at Council Bluffs, Ia., and Kansas City, Kan., subject to the following conditions:

1st. The grain must originate at points on the Union Pacific R. R. (not connecting lines) west of and including Gilmore, Nebraska; Muncie and Hund, Kan., and be transported by Union Pacific R. R. from such originating points to Council Bluffs, Iowa, or Kansas City, Kan., respectively.

2nd. The allowance will apply only on grain which moves to points beyond Council Bluffs, Ia., or Kansas City, Mo.

3rd. No allowance will be made when more than forty-eight hours elapse between time of delivery of load by the Union Pacific R. R. to the elevator and the release of the empty cars. The forty-eight hour limit will be computed from the time of delivery of the loaded cars by the Union Pacific R. R. to elevators located on its own tracks and the release of such cars by those elevators.

4th. Elevator companies, in presenting their claims for the above allowance, must substantiate, by duly certified records of connecting lines, the reshipment of the grain to points beyond, as above
224 outlined, same to be subject to verification by the Union Pacific R. R. Co.

5th. No payment, however, will be made unless and until the court of last resort determines the liability and that payment should be made. The reasons for this circular are that the Interstate Commerce Commission upon June 29, 1908, ordered that no such payments should be made. The owners of these elevators claim, however, that Union Pacific Railroad Company is bound to make the payments under long existing contracts and threaten suit under the same. This circular is therefore made to preserve all the rights of the parties and still comply with the order of the commission, thus enabling the questions presented to the commission to be ultimately determined by the courts.

Issued and mailed to I. C. C. Oct. 23, 1908. Effective Dec. 2, 1908.

By J. A. Munroe, freight traffic manager, Union Pacific Railroad, Omaha, Neb.

225

I. C. C. No. A–3248.
(Issued in lieu of I. C. C. No. A–3226, rejected by I. C. C.)
Cancels I. C. C. No. A–2983.
File 190–1.

1000
(The M K and T)

Missouri, Kansas & Texas Railway Co. in connection with the Missouri, Kansas & Texas Ry. Co. of Tex. (FX4 No. 118).

Freight tariff.

M. K. & T. Ry. System No. 4202–A.

(Issued in lieu of Tariff No. 4202, rejected by I. C. C.)

Cancels M. K. & T. No. 3848–B. Cancels M. K. & T. of Tex. No. 1661–B.

Naming elevation allowance on grain, carloads at St. Louis, Mo., and East St. Louis, Ills.

Issued June 16, 1909. Effective June 21, 1909.

(Issued under special permission of the Interstate Commerce Commission, No. 9879, of June 10, 1909.)

J. W. Allen, G. F. A., M. K. & T. Ry. Co. of Texas, Dallas, Tex.; J. L. West, A. G. F. A., M. K. & T. Ry. Co., St. Louis, Mo.; W. W. Miller, A. G. F. A., M. K. & T. Ry. Co., St. Louis, Mo.; R. W. Hockaday, G. F. A., M. K. & T. Ry. in Kansas, Parsons, Kans.; E. S. Briggs, A. G. F. A., M. K. & T. Ry. Co. of Tex., Houston, Tex.

Issued by W. B. Groseclose, G. F. A., M. K. & T. Ry. Co., St. Louis, Mo.

Mailed I. C. C. June 16, 1909.

226 DEFINITION OF TERM ELEVATION.

In order to more clearly define the practice of these companies with respect to making allowances for elevation the term "elevation" is understood to mean unloading of grain from cars into an elevator and loading same out again into cars and such other service as may be performed for the amount shown in the following item.

ALLOWANCE FOR ELEVATION.

On carload shipments of grain forwarded from St. Louis, Mo., or East St. Louis, Ill., or elevators located within St. Louis or East St. Louis switching limits, an allowance of three-fourths (¾) cents per one hundred pounds will be made by these companies for elevation when destined to points in Texas and to following points in Oklahoma, viz:

Ada ----------Okla.	Jennings ----------Okla.	Panama ----------Okla.
Bartlesville ----------Okla.	Krebs ----------Okla.	Prue ----------Okla.
Bokoshe ----------Okla.	Kiowa ----------Okla.	Reynolds ----------Okla.
Crowder ----------Okla.	Luther ----------Okla.	Shawnee ----------Okla.
Cushing ----------Okla.	Lehigh ----------Okla.	Stonewall ----------Okla.
Coalgate ----------Okla.	Muskogee ----------Okla.	Sparks ----------Okla.
Corretta ----------Okla.	McAlester ----------Okla.	Tulsa ----------Okla.
Dale ----------Okla.	Meridian ----------Okla.	Tupelo ----------Okla.
Dewey ----------Okla.	Midway ----------Okla.	Verdark ----------Okla.
Durant ----------Okla.	Navina ----------Okla.	Vinata ----------Okla.
Dustin ----------Okla.	Nelagony ----------Okla.	Wagoner ----------Okla.
El Reno----------Okla.	Norfolk ----------Okla.	Wilburton ----------Okla.
Fallis ----------Okla.	Oklahoma City ----Okla.	Weleetka Junction -Okla.
Guthrie ----------Okla.	Polsom----------Okla.	Warwick ----------Okla.
Henryetta ----------Okla.	Phillips ----------Okla.	Yale ----------Okla.

The above applies under the following conditions:

No. 1. No similar allowances shall have been made on such grain by any line.

No. 2. All payments under the above will be made only after check and verification by Chief Inspector Paul P. Rainer, Chicago, Ill., or District Inspector J. M. Ritchey, St. Louis, Mo.

227 No supplements to this tariff will be issued.

I. C. C. No. A–1050.
(Cancels I. C. C. No. A–789.)
Authority No. F 6235.

The Missouri Pacific Railway Company, St. Louis, Iron Mountain & Southern Ry. Co. and leased, operated, and independent lines.

Freight tariff of elevation charges No. 201–M.

(Cancels No. 201–L.)

Grain and seed, carloads.

Transferred through elevators located at Omaha, South Omaha, Nebraska City, Neb., Council Bluffs, Iowa, Atchison, Elwood, Leavenworth, Kansas City, Kan., Kansas City, St. Joseph, St. Louis, Mo., East St. Louis, Ill., and Coffeyville, Kan.

Issued June 23, 1909. Effective August 5, 1909.

Issued by W. B. Knight, assistant freight traffic manager, St. Louis, Mo.

Item No. 1.

On shipments of grain and seeds, carloads, shipped via the rails of these companies, transferred through elevators at Omaha, South Omaha, Nebraska City, Neb., Council Bluffs, Iowa, Atchison, Elwood, Leavenworth, Kansas City, Coffeyville, Kan., Kansas City and St. Joseph. Mo., these companies will pay the cost of transfer (and

228 such other services performed by the elevator included in such charge) not to exceed three-fourths of one cent per 100 pounds, when the destination of such shipments is to a point on the Mississippi River and points west thereof taking same rates, or beyond; to points in Arkansas, Louisiana, Texas, and Mexico, provided no previous payment for similar service at the same point has been made thereon.

Item No. 2.

The allowance as provided above will also be made at Atchison, Elwood, Leavenworth, Kansas City, Kan., Kansas City and St. Joseph, Mo., when the destination is to the following points, viz:

Anthony—Kan.	Granby—Mo.	Oronogo—Mo.
Argonia—Kan.	Great Bend—Kan.	Osage City—Kan.
Arkansas City—Kan.	Gridley—Kan.	Ottawa—Kan.
Asbury—Mo.	Harrisonville—Mo.	Oxford—Kan.
Aurora—Mo.	Hazelton—Kan.	Paola—Kan.
Belle Plaine—Kan.	Herington—Kan.	Peru—Kan.
Beloit—Kan.	Hope—Kan.	Pittsburg—Kan.
Benedict—Kan.	Independence—Kan.	Piqua—Kan.
Blue Rapids—Kan.	Iola—Kan.	Pleasanton—Kan.
Bridgeport—Kan.	Irving—Kan.	Polson—Okla.
Caney—Kan.	Joplin—Mo.	Quenemo—Kan.
Carterville—Mo.	Kanopolis—Kan.	Richards—Mo.
Carthage—Mo.	Kellogg—Kan.	Rich Hill—Mo.
Cedarville—Kan.	Kenneth—Kan.	Richter—Kan.
Cherokee—Kan.	Kincaid—Kan.	Riverdale—Kan.
Chetopa—Kan.	Kingman—Kan.	Salina—Kan.
Claremore—Okla.	Kiowa—Kan.	Sallisaw—Okla.
Clifton—Kan.	La Harpe—Kan.	Scott City—Kan.
Clyde—Kan.	Lamar—Mo.	Sherwin—Kan.
Coffeyville—Kan.	Larned—Kan.	Springfield—Mo.
Colony—Kan.	Leeds—Mo.	Stafford—Kan.
Concordia—Kan.	Le Roy Jct—Kan.	Topeka—Kan.
Council Grove—Kan.	Liberal—Mo.	Trilby—Kan.
Diamond—Mo.	Lindsborg—Kan.	Turon—Kan.
Dodson—Mo.	Lyons—Kan.	Vining Spur—Kan.
Elk City—Kan.	Madison—Kan.	Wagoner—Okla.
Ft. Gibson—Okla.	Mankato—Kan.	Washington—Kan.
Ft. Scott—Kan.	Minden—Mo.	Waverly—Kan.
Frederick—Kan.	Moran—Kan.	Webb City—Mo.
Fredonia—Kan.	Neodesha—Kan.	Wichita—Kan.
Gas—Kan.	Nevada—Mo.	Winfield—Kan.
Geneseo—Kan.	Niotaze—Kan.	Worland—Mo.
Godfrey—Kan.	Norwich—Kan.	

Item No. 3.

The allowance as provided above will also be made at Omaha, South Omaha, Neb., or Council Bluffs, Iowa, when the destination is St. Joseph, Mo., Atchison, Elwood, Leavenworth, Kan., and Kansas City, Mo.

229

Item No. 4.

The allowance as provided above will also be made at St. Louis, Mo., and East St. Louis, Ill., when destined to points in Arkansas, Louisiana, and Texas, except will not apply to lower Mississippi Valley points as named in A. D. Hall's Reshipping Tariff No. 2, I. C. C. No. A-9 (Mo. Pac. Tariff No. 243-A), supplements thereto, or reissues thereof.

Item No. 5.

No allowance will be made on grain or seed which has been converted into products thereof.

230 No supplements to this tariff will be issued except for the purpose of canceling same.

I. C. C. No. A-1284
(Cancels I. C. C. No. A-1234)
Authority No. F 8643

The Missouri Pacific Railway Company; St. Louis, Iron Mountain & Southern Ry. Co.; and Leased, Operated, and Independent Lines. Freight tariff of elevation charges No. 201-P. (Cancels No. 201-0.) Grain and seed, carloads. Transferred through elevators located at Omaha, South Omaha, Nebraska City, Neb.; Council Bluffs, *Bluffs*, Iowa; Atchison, Elwood, Leavenworth, Kan.; Kansas City, St. Joseph, St. Louis, Mo.; East St. Louis, Ill.; Cairo, Ill.; Kansas City, Kan.; and Coffeyville, Kan.

Issued November 16, 1909. Effective December 26, 1909.

Issued by W. B. Knight, chief of Tariff Bureau, St. Louis, Mo.

Item No. 1.

On shipments of grain and seed, carloads, shipped via the rails of these companies, transferred through elevators at Omaha, South Omaha, Nebraska City, Neb.; Council Bluffs, Iowa; Atchison, Elwood, Leavenworth, Kansas City, Coffeyville, Kan.; Kansas City and St. Joseph, Mo., these companies will pay the cost of transfer (and such other services performed by the elevator included in such charge), not to exceed three-fourths of one cent per 100 pounds,

231 when the destination of such shipments is to a point on the Mississippi River and points west thereof taking same rates, or beyond; to points in Arkansas, Louisiana, Texas, and Mexico, provided no previous payment for similar service at the same point has been made thereon.

Item No. 2.

The allowance as provided above will also be made at Atchison, Elwood, Leavenworth, Kansas City, Kan.; Kansas City, St. Joseph,

Mo.; Omaha, South Omaha, Neb.; and Council Bluffs, Iowa., when destined to competitive points in Missouri, Kansas, and Oklahoma; except will not apply when destined Dodson, Independence, and Leeds, Mo.

Item No. 3.

The allowance as provided above will also be made at Omaha, South Omaha, Neb., or Council Bluffs, Iowa., when the destination is St. Joseph, Mo.; Atchison, Elwood, Leavenworth, Kan.; and Kansas City, Mo.

Item No. 4.

The allowance as provided above will also be made at St. Louis, Mo.; East St. Louis, Ill.; and Cairo, Ill., when destined to points in Arkansas, Louisiana, Mexico, and Texas, except will not apply to lower Mississippi Valley points as named in A. D. Hall's Reshipping Tariff No. 2, I. C. C. No. A–9 (Mo. Pac. Tariff No. 243–A), and Mo. Pac. Tariff No. 1027–B (I. C. C. No. A–1235), supplements thereto or reissues thereof.

Item No. 5.

232 No supplements to this tariff will issue except for the purpose of cancelling the tariff.

I. C. C. No. A–3327
Cancels I. C. C. No. A–3248
(File 190–1)

Missouri, Kansas & Texas Railway Co.. in connection with the Missouri, Kansas & Texas Ry. Co. of Tex. (FX–4.) (No. 118.)

Freight tariff.

M., K. & T. No. 3202–B. Cancels No. 4202–A.

M., K. & T. of Tex. No. 4202–B. Cancels No. 4202–A.

Naming elevation allowance on grain, carloads, at St. Louis, Mo., and East St. Louis, Ill.

Issued November 4, 1909. Effective November 7, 1909.

J. W. Allen, G. F. A., M., K. & T. Ry. Co. of Texas, Dallas, Tex.; J. L. West, A. G. F. A., M., K. & T. Ry. Co., St. Louis, Mo.; W. W. Miller, A. G. F. A., M., K. & T. Ry. Co., St. Louis, Mo.; R. W. Hockaday, G. F. A., M., K. & T. Ry. in Kansas, Parsons, Kans.; E. S. Briggs, A. G. F. A., M., K. & T. Ry. Co. of Tex., Houston, Tex.

Issued by W. B. Groseclose, G. F. A., M., K. & T. Ry. Co., St. Louis, Mo.

Mailed I. C. C. November 4, 1909.

ALLOWANCE FOR ELEVATION.

(a) On carload shipments of grain forwarded from St. Louis, Mo., or East St. Louis, Ill., or elevators located within St. Louis or East St. Louis switching limits, an allowance of three-fourths (3/4) cents per one hundred pounds will be made by the M., K. & T. Ry. system for elevation (subject to requirements specified
233 herein) when destined points in Texas and Mexico, also the following points in Oklahoma, viz:

Ada ---------- Okla.	Jennings ---------- Okla.	Panama ---------- Okla.
Bartlesville ---------- Okla.	Krebs ---------- Okla.	Prue ---------- Okla.
Bokoshe ---------- Okla.	Kiowa ---------- Okla.	Reynolds ---------- Okla.
Crowder ---------- Okla.	Luther ---------- Okla.	Shawnee ---------- Okla.
Cushing ---------- Okla.	Lehigh ---------- Okla.	Stonewall ---------- Okla.
Coalgate ---------- Okla.	Muskogee ---------- Okla.	Sparks ---------- Okla.
Coretta ---------- Okla.	McAlester ---------- Okla.	Tulsa ---------- Okla.
Dale ---------- Okla.	Meridian ---------- Okla.	Tupelo ---------- Okla.
Dewey ---------- Okla.	Midway ---------- Okla.	Verdark ---------- Okla.
Durant ---------- Okla.	Navina ---------- Okla.	Vinita ---------- Okla.
Dustin ---------- Okla.	Nelagony ---------- Okla.	Wagoner ---------- Okla.
El Reno ---------- Okla.	Norfolk ---------- Okla.	Wilburton ---------- Okla.
Fallis ---------- Okla.	Oklahoma City ---------- Okla.	Weleetka Junction ---------- Okla.
Guthrie ---------- Okla.	Polson ---------- Okla.	Warwick ---------- Okla.
Henryetta ---------- Okla.	Phillips ---------- Okla.	Yale ---------- Okla.

REQUIREMENTS, SUPERVISION, AND CHECK.

(b) No payment will be made where a similar allowance has been made on same grain by some other line.

All payments under the above will be made only after check and verification by Chief Inspector Paul R. Rainer, Chicago, Ill., or District Inspector J. M. Ritchey, St. Louis, Mo.

DEFINITION OF TERM "ELEVATION."

(c) In order to more clearly define the practice of the M., K. & T. Ry. system with respect to making allowances for elevation, the term "elevation" is understood to mean unloading of grain from cars into an elevator and loading same out again into cars, and such other service as may be performed for the amount shown in paragraph "a."

234 Afterwards, to wit, on the 3rd day of March, 1910, the same being a day of the regular November term of said court, the following decree was filed and entered of record:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

HARRY J. DIFFENBAUGH, EDMUND D. BIGELOW, and Charles W. Lonsdale, as officers and members of the Board of Trade of Kansas City; Omaha Grain Exchange, a corporation; St. Joseph Board of Trade, a corporation; and William S. Washer, Edwin Lukins, and Samuel E. Harbuger, as officers and members of the Atchison Board of Trade, complainants,

vs.

INTERSTATE COMMERCE COMMISSION, defendant.

No. 3437. In Equity.

DECREE.

This cause was heard on the 24th day of January, A. D. 1910, before Walter H. Sanborn, William C. Hook, and Elmer B. Adams, judges of the said Circuit Court, and was then submitted to the court for final determination and decree, and thereupon, upon consideration thereof,

It is hereby ordered, adjudged, and decreed that the demurrer of the Interstate Commerce Commission be, and the same hereby is, overruled; that upon condition that the answer of the Interstate Commerce Commission to the complainants herein, the replication thereto, and the evidence in this case stand as answer, replication, and evidence upon the claims of Chicago & Alton Railroad Company, Chicago Great Western Railroad Company, Wabash Railroad Company, and the Chicago, Milwaukee & St. Paul Railway Company, and that the final hearing in this case, which has been had, stand and be the final hearing upon the intervening petitions of these railroad companies; their motion for leave to file their intervening peti-
235 tions and to become parties to this suit be, and it is hereby, granted, and that the order of the Interstate Commerce Commission made on the 29th day of June, A. D. 1908, "that the defendants, the Chicago, Burlington & Quincy Railroad Company; the Missouri Pacific Railway Company; the Chicago, Rock Island & Pacific Railway Company; the St. Louis & San Francisco Railroad Company; and the Missouri, Kansas & Texas Railway Company, be, and they severally are hereby, notified and required to cease and desist, on or before the first day of October, 1908, and for a period of at least two years thereafter abstain from giving or paying ¾ of 1 cent per 100 pounds or any other sum as an allowance or compensation for services rendered in the elevation of grain at Kansas City, Mo., and other Missouri River points on their respective lines, or points or places in territory adjacent thereto. Tariffs withdrawing said allowance may be made effective upon thirty days' notice to the

public and the Interstate Commerce Commission, given in the manner required by law, must contain the notation that they are issued under the authority hereby granted, and must refer to the titles and numbers of these cases," be, and the same is hereby, set aside, suspended, and annulled, and the enforcement thereof is hereby perpetually restrained and enjoined, and that the complainants recover from the Interstate Commerce Commission their costs herein, taxed at $.

It is further ordered, adjudged, and decreed that the Interstate Commerce Commission, and its members, agents, servants, and representatives, be, and they are and each of them is hereby, perpetually enjoined from enforcing the said order and from taking any steps or instituting any proceedings for the enforcement thereof.

(Signed) WALTER H. SANBORN,
(Signed) WILLIAM C. HOOK,
(Signed) ELMER B. ADAMS,
Circuit Judges.

236 Afterwards, to wit, on the 1st day of April, 1910, a petition for appeal and assignment of errors were filed.

Said petition for appeal and assignment of errors are in words and figures as follows, to wit:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

HARRY J. DIFFENBAUGH, EDMUND D. BIGELOW, and Charles W. Lonsdale, as officers and members of the Board of Trade of Kansas City; Omaha Grain Exchange, a corporation; St. Joseph Board of Trade, a corporation; and William S. Washer, Edwin Lukins, and Samuel E. Harburger, as officers and members of the Atchison Board of Trade, complainants,

vs.

INTERSTATE COMMERCE COMMISSION, DEFENDANT; Chicago & Alton Railroad Company, Chicago, Great Western Railroad Company, Wabash Railroad Company, and the Chicago, Milwaukee & St. Paul Railway Company, intervenors.

In Equity. No. 3437.

PETITION FOR APPEAL.

The Interstate Commerce Commission, the defendant in the above-entitled cause, by its solicitors, Arba S. Van Valkenburgh and P. J. Farrell, represents that in the decree or order of said Circuit Court in said cause, rendered on the 3rd day of March, 1910, there is mani-

fest error, to its injury, and therefore prays for an order granting an appeal from said decree to the Supreme Court of the United States.

A. S. VAN VALKENBURGH,
P. J. FARRELL,
Solicitors for Interstate Commerce Commission.

237 In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

HARRY J. DIFFENBAUGH, EDMUND D. BIGELOW and CHARLES W. LONSDALE, as officers and members of the Board of Trade of Kansas City; Omaha Grain Exchange, a corporation; St. Joseph Board of Trade, a corporation; and WILLIAM S. WASHER, as officers and members of the Atchison Board of Trade, complainants,

vs.

INTERSTATE COMMERCE COMMISSION, DEFENDANT; Chicago & Alton Railroad Company, Chicago Great Western Railroad Company, Wabash Railroad Company, and the Chicago, Milwaukee & St. Paul Railway Company, intervenors.

In Equity. No. 3437.

ASSIGNMENT OF ERROR.

And now, on the 1st day of April, 1910, comes the above-named defendant, Interstate Commerce Commission, by its solicitors and says that the above-entitled cause is erroneous and against the just rights of said defendant for the following reasons:

1. The Circuit Court erred in not dismissing the bill for want of jurisdiction.

2. The Circuit Court erred in not dismissing the bill for want of equity.

3. The Circuit Court erred in overruling the demurrer of the commission.

4. The Circuit Court erred in ruling that a party may institute and maintain in court a suit to suspend or set aside an order of the
238 commission although he be not a party to the proceedings before the commission upon which the order is based, or a party to the order.

5. The Circuit Court erred in ruling that a party may intervene and become a party to a suit instituted in court to suspend or set aside an order of the commission, although he be not a party to the proceedings before the commission upon which the order if based or a party to the order.

6. The Circuit Court erred in ruling that the complainants have a legal interest in the subject matter of said order.

7. The Circuit Court erred in ruling that the complainants have an interest in the subject matter of said order which can be enforced in this suit.

8. The Circuit Court erred in ruling that the intervenors have a legal interest in the subject matter of said order.

9. The Circuit Court erred in ruling that the intervenors have an interest in the subject matter of said order which can be enforced in this suit.

10. The Circuit Court erred in permitting the Chicago & Alton Railroad Company, the Chicago Great Western Railroad Company, the Wabash Railroad Company, and the Chicago, Milwaukee & St. Paul Railway Company to intervene and become parties to this suit.

11. The Circuit Court erred in ruling that the commission has no power to require a carrier to cease and desist from paying an allowance or compensation for services rendered in the elevation of grain, under circumstances where, in the opinion of the commission, unjust discrimination, undue preference and undue prejudice can not otherwise be prevented.

12. The Circuit Court erred in ruling that where a carrier transports in one of its own cars traffic destined to a point beyond the terminus of its own line of railway it has a right to insist that at such terminus the traffic shall be unloaded and the car released.

239 13. The Circuit Court erred in ruling that all services performed in connection with the elevation of property transported are transportation.

14. The Circuit Court erred in ruling that the allegations in the bill that the order is beyond the power of the commission and will irreparably injure the property and business of the complainants constitute good ground for equitable relief.

15. The Circuit Court erred in ruling that the discrimination disclosed by the record is authorized by law.

16. The Circuit Court erred in ruling that a party who performs services in connection with the elevation of grain he is interested in is entitled to compensation for such services in addition to the cost of performing same, regardless of other pecuniary advantages he may obtain by reason of having an opportunity to perform said services, and regardless of discriminations which may result from such advantages.

17. The Circuit Court erred in ruling that the facts disclosed by the record did not constitute a violation of section 2 of the act to regulate commerce.

18. The Circuit Court erred in ruling that the facts disclosed by the record did not constitute a violation of section 3 of said act.

19. The Circuit Court erred in entering a decree annulling and enjoining enforcement of the order of the commission.

For all of which reasons the decree and holding of the Circuit Court in such regard should be reversed.

A. S. VAN VALKENBURGH,
P. J. FARRELL,
Solicitors for the Interstate Commerce Commission.

240 Afterwards, to wit, on the 1st day of April, 1910, an order allowing appeal was filed and entered of record. Said order is in words and figures as follows:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

HARRY J. DIFFENBAUGH, EDMUND D. BIGELOW, and Charles W. Lonsdale, as officers and members of the Board of Trade of Kansas City; Omaha Grain Exchange, a corporation; St. Joseph Board of Trade, a corporation; and William S. Washer, Edwin Lukins, and Samuel E. Harburger, as officers and members of the Atchison Board of Trade, complainants, *vs.* INTERSTATE COMMERCE COMMISSION, DEFENDANT; Chicago & Alton Railroad Company, Chicago Great Western Railroad Company, Wabash Railroad Company, and the Chicago, Milwaukee & St. Paul Railway Company, intervenors.	In Equity. No. 3437.

ORDER ALLOWING APPEAL.

In this cause the Interstate Commerce Commission, the defendant, by its solicitors, Arba S. Van Valkenburgh and P. J. Farrell, having made its application in writing for an appeal from the decree therein, rendered on the 3rd day of March, 1910, to the Supreme Court of the United States, and it appearing that the matter in dispute in said cause exceeds the sum of $2,000, exclusive of costs, it is therefore ordered that said appeal be, and the same is hereby, granted and returnable on the 1st day of April, 1910.

(Signed) WILLIAM C. HOOK, *Judge.*

241 In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

F. H. PEAVEY & COMPANY, OMAHA ELEVATOR Company, and Midland Elevator Company, complainants,

vs.

UNION PACIFIC RAILROAD COMPANY AND Martin A. Knapp, Judson C. Clements, Charles A. Prouty, Francis M. Cockrell, Franklin K. Lane, James S. Harlan, and Edgar E. Clark, members composing the Interstate Commerce Commission, defendants. } No. 3405. In Equity.

HARRY J. DIFFENBAUGH, EDMUND D. BIGElow, and Charles W. Lonsdale, as officers and members of the Board of Trade of Kansas City; Omaha Grain Exchange, a corporation; St. Joseph Board of Trade, a corporation; and William S. Washer, Edwin Lukins, and Samuel E. Harburger, as officers and members of the Atchison Board of Trade, complainants,

vs.

INTERSTATE COMMERCE COMMISSION, DEFENDant; Chicago & Alton Railroad Company, Chicago Great Western Railroad Company, Wabash Railroad Company, and the Chicago, Milwaukee & St. Paul Railway Company, interveners. } No. 3437. In Equity.

Mr. Frank Hagerman argued the case for Peavey & Company and the complainants in both suits. Mr. M. B. Koon, Mr. George T. Bell, and Mr. John Barton Payne appeared with him on the briefs.

Mr. Arba S. Van Valkenburgh and Mr. P. J. Farrell argued the case for the Interstate Commerce Commission.

Mr. F. C. Dillard and Mr. Edson Rich argued the case for the Union Pacific Railroad Company. Mr. N. H. Loomis and Mr. R. W. Blair were with them on the briefs.

Mr. Frank Hagerman and Mr. John Barton Payne argued the case for the intervenors.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

242

SYLLABUS.

1. Interstate commerce act. Parties to suits to avoid orders of commission not necessarily parties to proceedings before commission.

Parties injuriously affected by the orders of the Interstate Commerce Commission may lawfully institute suits in the Circuit Courts to enjoin, suspend, or annul such orders, although they were not parties to the proceeding before the commission on which the orders are based.

Parties similarly situated may intervene in such suits.

2. Interstate Commerce Commission. Jurisdiction of courts to relieve from its orders

The wisdom or expediency of the lawful discharge of the administrative duties of the Interstate Commerce Commission is not reviewable by the courts.

But the courts may relieve from orders of the commission which deprive complainants of their property without due process of law, or take it without just compensation, from those which are beyond the delegated power of the commission, and from those which evidence so unreasonable an exercise of its power as to be substantially without though fornally within it.

3. Same. Orders prohibiting payment or allowance for elevation and transfer in transit beyond the power of the commission.

Orders of the commission which prohibit the allowance or payment by carriers of all compensation to owners and operators of elevators for elevation and transfer in transit are beyond the delegated power of the commission.

An order which forbids a carrier to allow or pay to the owner of an elevator any compensation for elevation in transit of grain which he ships, unless he refuses to clean, clip, mix, inspect, or grade the grain while it is passing through the elevator, is beyond the power of the commission.

243 SANBORN, Circuit Judge:

Has the Interstate Commerce Commission the power to prohibit railroad companies from paying to the owners and lessees of elevators all compensation for the elevation of grain in transit?

Until June 29, 1908, repeated decisions of the commission and the practice of carriers and shippers had been consonant with a negative answer to this question. In the Matter of Allowances to Elevators by the Union Pacific R. R. Co. (June 25, 1904), 10 I. C. C. R., 309, 324, 325, 326; Re Hearing on Petition of Chicago Great Western Ry. Co. and others (April 9, 1907), 12 I. C. C. R., 85, 89; City Council of Atchison v. Missouri Pacific Railway Co. (April 29, 1907), 12 I. C. C. R, 112, 114; Consolidated Forwarding Company v. Southern Pacific Company (April 19, 1902), 9 I. C. C. R., 182, 206e; American National Livestock Assn. & Cattle Raising Assn. of Texas v. Texas Pacific Ry. Co. (March 7, 1907), 12 I. C. C. R., 32, 36; Central Yellow Pine Assn. v. Vicksburg, Shreveport & Pacific Ry. Co. (March 19, 1904), 10 I. C. C. R., 193, 211, 213; In the Matter of Unlawful Rates and Practices in the Transportation of Cotton by the Kansas City, Memphis & Birmingham R. R. Co., 8 I. C. C. R., 121, 136, 139, 140; Merchants Cotton Press & Storage Co. v. Inter-

state Commerce Commission (June 24, 1909), 17 I. C. C. R, 78, 99, 101, 103, 105; Kentucky Railroad Commission v. L. & N. R. R. Co., 10 I. C. C. R., 173.

On June 29, 1908, the commission gave an affirmative answer to the question before us and issued orders which in terms forbade the Chicago, Burlington & Quincy R. R. Co., the Missouri Pacific Ry. Co., the St. Louis & San Francisco R. R. Co., the Chicago, Rock Island & Pacific R. R. Co., and the Missouri, Kansas & Texas Railroad Company, and in effect forbade the Union Pacific R. R. Co. to pay or allow to the owners or lessees of elevators at Omaha, Kansas City, and other cities on the Missouri River any compensation whatever for the elevation of grain in transit at those points, and
244 on October 16, 1908, announced that the principle of the decision upon which these orders are based applies everywhere, and that the commission expects that it will be universally accepted by carriers throughout the Nation. In the Matter of Allowances to Elevators by the Union Pacific R. R. Co., 14 I. C. C. R., 315; Traffic Bureau Merchants Exchange of St. Louis v. Chicago, Burlington & Quincy R. R. Co., 14 I. C. C. R., 317, 331, 510.

Mindful of the fact that this ruling and these orders were subversive of former decisions and of an approved course of business thereunder, in reliance upon which hundreds of thousands of dollars had been invested in elevators and facilities for the transfer of grain, that great grain markets had been established near the producers upon the Misouri River at the termini of railroad systems, and that the parties in interest desired a review of the legal issue presented, the commission postponed the effective date of the orders until the suits in hand could be brought to final hearing.

It may not be unprofitable before entering upon the discussion of the question at issue to call to mind a few general propositions of law, the general situation of the parties, the business and the transportation out of which this issue arises.

Every railroad company has the right to insist that its cars shall be unloaded at the termini of its railroad, and that their contents destined to points beyond shall be loaded into cars or other vehicles of the connecting carriers. Elevation and weighing in the elevator are indispensable means of the transfer of grain from the cars of one carrier to those of another under the existing conditions and methods of transportation through our large cities. There is neither time nor space nor labor for the shovel or any other method of transfer, or for weighing in the car or any other method of weighing. The operators of elevators weigh and certify to the weight of grain
245 as it passes through their elevators or it is weighed in the elevators and its weight is certified by some official of the State or of some grain exchange or other association, and these certificates are accepted as conclusive evidence by carriers, shippers, and dealers alike. Elevation consists of the unloading of grain from cars or vessels into elevators and the loading of the grain out again into cars or into other vehicles. As elevation is indispensable to

weighing in the elevator, if the prohibition of compensation for elevation in transit shall prevent the elevation of the grain at the Missouri River it will also prevent the weighing there, so that the inhibition at issue *at* these cases really involves transportation services both in elevation and in weighing in transit.

"All services in connection with the * * * elevation * * * of the property transported" are transportation. Act of June 29, 1906, to amend interstate commerce act, Statutes at Large, pages 584, 586, secs. 1 and 2. Railroad companies are required to furnish these services upon request, sec. 1; to state separately in their schedules their charges therefor (sec. 6, as amended, page 586), and if such services are rendered by the owner of the property transported the charge and allowance therefor may not be more than is just and reasonable (sec. 15 as amended, page 590). The allowance for the elevation of grain here in question was three-fourths of a cent per hundred pounds, it was separately stated in the schedules of the carriers and was allowed only upon grain received into the elevators from cars coming from the west, which was shipped out of the elevators into cars bound east, north, and south. The same services in elevation were offered to all shippers, and the same allowance was made to all operators of elevators, whether they were or were not the owners of the grain transported.

More than 90%, nearly all of the grain brought to the Missouri River, passes on to destinations east, north, and south. This grain takes the local rate from points west of the Missouri River to the river, and from the Missouri River to the Mississippi River and
246 to points beyond it takes the proportional rate which is less than the local rate upon a certificate that it has come from points west of the Missouri River.

In 1907, 209,728,650 bushels of grain were handled in and out of Omaha, Kansas City, Atchison, and St. Joseph. Since January 1, 1904, more than three million dollars have been invested in elevators in those cities for the purpose of handling this grain.

The Union Pacific R. R. Co. has railroads extending into and through the grain fields of Kansas and Nebraska, and its eastern termini are at Kansas City and Council Bluffs, which for the purpose of this opinion is included in the general term "Omaha." The greater volume of the grain moves from the fields in Kansas and Nebraska each year to the Missouri River in a few months in the autumn and winter. The portion of that grain which a railroad company can haul depends upon the number of box cars it can use for this purpose during this small portion of the year. The Union Pacific Company has the short haul. It is in competition with companies that have railroads from these grain fields through Missouri River points to and beyond the Mississippi River. They can carry this grain profitably on their own cars and rails east as well as west of the Missouri River without elevation, but it is requisite to the profitable use by the Union Pacific Company of its equipment that the grain be elevated out of its cars at the Missouri River and that the cars

be sent back west for new loads promptly. If it permits these cars to pass on east over connecting lines, they will be absent when their use upon its railroads is most needed and is most profitable; it will lose a large share of the traffic in this grain and of the revenue which it could earn by the use of its cars upon its own tracks. Thus the elevation of the grain at Omaha and Kansas City is necessary to the reasonable competition and participation of the Union Pacific Company in this transportation.

The Chicago Great Western Railroad Company and other companies whose western termini are at Missouri River points
247 are in a like situation. The elevation of the grain at those cities is equally indispensable to their participation in this traffic. They can get no grain into their cars at Omaha and Kansas City unless it is first taken out of the cars which bring it from the west to the river.

On the other hand, carriers that have railroads from the grain fields of Nebraska and Kansas through the Missouri River cities to the north, east, and south are interested to prevent elevation at the river, because the companies whose railroads terminate there can not compete with them successfully in the absence of this facile means of transfer of the grain from the cars of the company west of the river to those of the company east of it.

But perhaps the parties most deeply interested in the issue before us are the owners, lessees, and operators of the elevators at the Missouri River cities and at all other cities in the nation where great terminal elevators have been constructed. For years carriers have used these elevators and have paid their owners and lessees for the transfer of the grain through them, and the latter have invested large amounts of money in the construction of these buildings and in the establishment of markets near the grain fields that may be seriously affected if this practice is declared to be unlawful and is henceforth prohibited.

In 1899 the Union Pacific Company, mindful of the necessity of unloading its cars of grain at the eastern termini of its roads and of promptly returning them westerly for new loads, requested Mr. Frank H. Peavey to construct and operate an elevator for this purpose at Council Bluffs. He consented and made a contract with the company to build and operate an elevator with a capacity of 1,000,000 bushels, and to unload, store for 48 hours, and reload grain to the capacity of his elevator for the Union Pacific Company, and that company contracted to pay him not exceeding one and one-fourth cents per hundred pounds for the first ten years and one cent per hun-
248 dred pounds for the second ten years for this service. He built an elevator of the capacity specified in the year 1899, at an expense of $200,000.00, in reliance upon this contract, and this elevator has ever since been operated thereunder by reason of this agreement. Mr. Peavey assigned his contract to the complainant, Omaha Elevator Company, a corporation, and an average of over 600,000,000 bushels of grain passes through the elevator annually. Another ele-

vator, now owned and operated by the complainant, the Midland Elevator Company, through which an average of more than $2,500,000 bushels of grain passes annually, was built and is operated at Kansas City under a like contract. The complainant, F. H. Peavey & Company, is a corporation. It owns nearly all the stock of the two elevator companies, and henceforth the contracts, the elevators, and their rights and interests will be treated as those of Peavey & Company. Peavey & Company owns many country elevators on the railroads of the Union Pacific Company and is a purchaser and shipper of most of the grain which passes through its terminal elevators.

On June 25, 1904, after an investigation of these contracts and of the practice of the Union Pacific Company to allow Peavey & Company one and one-fourth cents per hundred pounds for the elevation of its own grain, as well as that of others, and after consideration of the contentions then made that this allowance gave it opportunities to violate the prohibition of rebates (10 I. C. C. R., 320); that it secured thereby the commercial advantages of treating the grain—that is, of cleaning, clipping, inspecting, mixing, and grading it during its elevation—which shippers who had no terminal elevators did not receive (325), the commission held that the contracts were made in good faith, that the allowance was reasonable, and that no requirement of the law had been disregarded in their making or their performance (321, 326).

On April 9, 1907, after a rehearing on the petition of the Chicago Great Western Railway Company and others, the commission held that an allowance to the owner of an elevator of more than the
249 cost of elevation for the service of elevating his own grain wrought a preference and a rebate; that three-fourths of a cent per hundred pounds was not in excess of the cost of elevation and would return no profit to Peavy & Company, and it ordered the allowance made to it by the Union Pacific Company reduced to that amount (12 I. C. C. R., 85). In all other respects the commission adhered to and re-affirmed its former ruling. It held that elevation is a facility which a carrier may provide for the benefit of shippers if it finds it to its interest so to do; that this facility must be open to all on equal and reasonable terms; that a railroad company may construct elevators itself or make an arrangement with the owner of an elevator to furnish elevation facilities (87), and that the commission has no power under the acts of Congress to forbid a railroad company from contracting with an owner of an elevator, who is also a shipper, for such facilities, but that its authority extends to such regulation and control of the relations between them as will protect the rights of others and enforce the observance of the law (89).

The Union Pacific Company in 1906 extended to all elevators at Omaha and Kansas City the allowance it made to Peavey & Company. Its official published schedules have provided since June 27, 1906, that "to expedite the movement and to secure the prompt re-

lease and return of equipment an allowance of (1¼ cents prior to June 1, 1907, and ¾ of a cent since that date) per hundred pounds will be made by the Union Pacific Company to the elevators performing the service on grain in carloads transferred by the elevators at South Omaha, Omaha, Council Bluffs, and Kansas City, subject to the following conditions:" (1) All grain must originate west of these cities upon the railroads of and be transported to these cities by the Union Pacific Company; (2) the allowance will be made on grain which moves to points beyond Council Bluffs or Kansas City only; (3) no allowance will be made when more than 48 hours elapse between the time of delivery of loads by the Union Pacific Company to the elevator or connecting lines and the release and
250 return of the empty cars to the Union Pacific Railroad. It will be noticed that the schedules and practice of the company offered this allowance to all elevators at the eastern termini, and this elevation to all shippers whose grain went beyond its termini for the same rate of compensation, whether they were owners of elevators or not, and that it made this offer to induce the prompt return of its cars to the western grain fields.

On June 29, 1908, upon a second rehearing, the commission held that any allowance to Peavey & Company for the elevation of the grain which it shipped through its terminal elevators was an undue preference and therefore unlawful, because by the use of these elevators it secured at the same time with the elevation the commercial advantages of cleaning, clipping, inspecting, mixing, and grading the grain, which were no part of transportation (14 I. C. C. R., 315, 316). It accordingly ordered that the Union Pacific Company cease " from paying any allowance to Peavey & Company on grain belonging to them, or in which they have any direct or indirect ownership or interest, that has been mixed, treated, weighed, or inspected in any of their said elevators at Kansas City and Council Bluffs." Under this order it will be seen that Peavey & Company may collect the allowance for the elevation of its grain from the Union Pacific Company on condition that it uses its terminal elevators for the purpose of elevating this grain alone. It may treat its grain at other elevators, then ship it through Omaha and Kansas City, elevate it there, and receive the allowance for elevation on condition that it does not again treat it there. Peavey & Company and its elevator companies have continued to elevate the grain which they shipped through the termini of the Union Pacific Company and to return the empty cars in accordance with their contracts and the schedules of the Union Pacific Company, but the latter corporation has refused to allow or to pay them anything for these services, which have
251 been rendered since the last order of the commission, and the complainants have brought and prosecuted their suit to enjoin the enforcement of this order and to recover of the Union Pacific Company compensation for this elevation.

Late in the year 1907, the Traffic Bureau, a department of the Merchants' Exchange of St. Louis, an association operating under the

laws of Missouri, to promote the commercial interests of that city, filed petitions against Chicago, Burlington & Quincy Railroad Company, Missouri Pacific Railway Company, St. Louis & San Francisco Railroad Company, and Missouri, Kansas & Texas Railway Company, corporations which own through lines of railroad from the grain fields of Kansas and Nebraska to points east of the Missouri River and which were interested to prevent elevation of grain at Missouri River points, but were making the same allowance for elevation there that were made by the Union Pacific Company in order to meet the latter's competition, and prayed that the commission would abolish this allowance for elevation, and on June 29, 1908, the same day that it made the order in the case of the Union Pacific Company, the commission ordered these railroad companies to abstain "from giving or paying three-fourths of a cent per hundred pounds, or any other sum, as an allowance or compensation for service rendered in the elevation of grain at Kansas City, Mo., and other Missouri River points." (14 I. C. C. R., 317, 331.) Parties who represented the complainants in the second case under consideration applied to the commission to grant them a hearing, but this was denied them, and the commission said: "A cardinal consideration in our conclusion was the belief that in no way could discrimination and preference be prevented, except by a complete prohibition of these payments and privileges. The principle of our decision applies everywhere. We expect that the decision will be universally accepted." (14 I. C. C. R., 510.) The interstate commerce act authorizes incorporated boards of trade of cities and associations of like character to apply to
252 the commission for relief (24 Stat., 383, sec. 13) and such corporations and members representing such associations may likewise apply to the court for relief from injuries unlawfully inflicted by the commission.

Thereupon Harry J. Diffenbaugh, Edmund D. Bigelow, and Charles W. Lonsdale, the president, secretary, and chairman, respectively, of the transportation committee of, and who were authorized to represent, the Board of Trade of Kansas City, which is an association of 200 members, consisting of operators of grain elevators, millers, and dealers in grain, who handled a total of 11,334,050 bushels of grain of the value of $70,739,930.00 in the year 1907; the Omaha Grain Exchange, a corporation whose members are engaged in the same business and interested in this order in the same way at Omaha; the St. Joseph Board of Trade, a corporation; and certain individuals representing the Atchison Board of Trade, exhibited their bill against the commission, wherein they set forth the material facts which have been recited; alleged that this order of the commission was violative of the Constitution, beyond the powers of the commission, and that its enforcement would depreciate the value of their elevators and their investments in these and other facilities for the transfer, purchase, and sale of grain in their cities by depriving them of compensation for its transfer; would draw away from their cities to eastern, northern, and southern marts a large volume of their grain

business; and would tend to diminish the grain markets in their cities to their irreparable injury, and prayed for equitable relief. The commission demurred to this bill, and the argument on the demurrer was submitted at the final hearing of these cases.

At this final hearing a motion was made by the Chicago, Milwaukee & St. Paul Railway Company, the Wabash Railroad Company, the Chicago Great Western Railroad Company, and the Chicago & Alton Railroad Company for leave to file intervening petitions in this Diffenbaugh case, and this motion was submitted for decision. The petitions of these companies show that they own railroads whose western termini are at the Missouri River cities; that if they are denied the right to provide for the transfer and weighing of grain by making compensation therefor to the operators of elevators at these cities their railroad terminals and the elevators there, some of which are owned by one of these companies, will be greatly depreciated in value; the shippers and producers of grain on lines of railway which have their eastern termini at the Missouri River cities, in the shipment of their grain to points east, north, and south of that river, will be compelled to pay large sums of money for transferring and weighing their grain at the river, while producers and shippers of grain located on lines of railroad extending through those cities to the east, north, and north will incur no such expense, and will thus secure an undue preference; that the volume of grain which under the present allowance passes over the petitioners' lines of railroad will be diverted from their railroads to the through lines and from the markets at the Missouri River cities to eastern, northern, and southern cities; and that a similar depreciation of the values of terminal and elevator property and business and like diversion of grain and the traffic therein from established grain markets in the region between the Allegheny Mountains and the Missouri River will be effected if the prohibitive order of the commission is put into operation throughout the Nation, and they ask that the prayer of the complainants in the Diffenbaugh case be granted.

253

The demurrer to the bill of Diffenbaugh and his associates presents two objections: That the complainants were not parties to the proceeding before the commission upon which the order challenged is based, and that there is no equity in the bill. But this is a controversy between competitors in transportation and in trade, between the traffic bureau of St. Louis and the owners of the lines of railroad which extend from the grain fields of Kansas and Nebraska through the Missouri River cities upon one side and the boards of trade, the owners of elevators, and dealers of grain in the Missouri River cities and the railroad companies whose termini are at those cities on the other. The former are interested in opposition to the transfer of grain at those cities and to any allowance therefor; the latter are interested to promote the transfer of grain in those cities and to secure an allowance therefor. One of the parties opposed to this transfer upon notice to other parties who are equally opposed to it, and without any notice to any party in favor of it, has

254

procured this final order of the commission, which prohibits the railroad companies from making any allowance for the elevation, necessarily deteriorates the value of the property, diminishes the volume and the profit of the business, strikes down profitable contracts, and destroys the right of parties in favor of the transfer to make such contracts. These parties have no remedy at law. Are they deprived of the right to equitable relief because those opposed to them did not cause them to be made parties to the proceeding or to be notified of the hearing before the commission upon which this order is founded? If so, parties may easily deprive those injuriously affected by such orders of all relief by making, as in this case, those having a like interest parties to the proceeding and excluding those who are interested in opposition to their interest. In such a case none of the parties to the proceeding may successfully maintain a suit to challenge the order because none of their interests are irreparably or at all injured, and if those whose interests are injuriously affected may not assail it, the order is impregnable. This cannot be the true rule of right or of practice. A careful search of the interstate commerce act discloses no limitation of the parties who may maintain suits to enjoin, set aside, annul, or suspend an order of the commission
255 to those who were parties to the proceeding before it upon which the order was based. The proceeding in the court is not an appeal; it is a plenary suit in equity. "The jurisdiction to hear and determine such suits" is vested in the Circuit Courts. Sec. 16, as amended, 34 Stat., 592. The determination of the question what parties may maintain such suits is left by the interstate commerce act to the general rules and practice in equity, and under them any party whose rights of property are in danger of irreparable injury from an unauthorized order of the commission may appeal to a Federal court of equity for relief. Such an order issued without notice to the parties injuriously affected and without opportunity to them to present meritorious defenses is not more conclusive than a judgment of a court, and Chief Justice Marshall declared in Marine Insurance Company v. Hodgson, 7 Cranch, 332, 336, that "Any fact which clearly proves it to be against conscience to execute a judgment, and of which the injured party could not have availed himself in a court of law, and of which he might have availed himself at law, but was prevented by fraud or accident, unmixed with any fault or negligence in himself or his agents, will justify an application to a court of chancery." Hendrickson v. Hinckley, 17 How., 442, 444; Hungerford v. Sigerson, 20 How., 156, 161; Gaines v. Fuentes, 92 U. S., 10, 22; Barrow v. Hunton, 99 U. S., 80, 85; Johnson v. Waters, 111 U. S., 640, 667; Arrowsmith v. Gleason, 129 U. S., 86, 97, 98; Marshall v. Holmes, 141 U. S., 589, 596; National Surety Company v. State Bank, 120 Fed., 593, 598; 56 C. C. A., 657, 662. The complainants in the Diffenbaugh case are entitled to challenge the order of the commission in this court; the allegations in their bill that this order was beyond the power of the commission and will irreparably injure their property and their business present good ground for

equitable relief, and the demurrer of the commission must be overruled. For the same reasons the petitions of the railroad companies that seek to intervene present substantial equities, and their
256 motion for leave to file them and to become parties to this suit must be granted.

The Interstate Commerce Commission is an administrative tribunal, and the wisdom and expediency of the lawful exercise of the discretion delegated to it under the Constitution and the statutes is not reviewable by the courts; but the power is vested in and the duty is imposed upon the Circuit Courts to relieve from orders of the commission which deprive complainants of their property without due process of law or take it without just compensation, in violation of the fifth amendment to the Constitution, from orders which are beyond the limits of the power delegated by the acts of Congress to the commission and from orders which, though in form within its delegated power, evidence so unreasonable an exercise of it that they are in substance beyond it. (Interstate Commerce Commission v. Illinois Central Railroad Company, Supreme Court, January 10, 1910; Stickney v. Interstate Commerce Commission, Supreme Court, Nov. 29, 1909; 164 Fed., 638, 644; Missouri, Kansas & Texas Ry. Co. v. Commission, 164 Fed., 645, 648.)

Laying aside the question of the constitutionality of the orders challenged in these cases, let us consider this question: Has the commission been empowered to prohibit allowances and payments of compensation for the transfer by elevators of grain in transit? The statutes under which the commission acts require the rates for transportation, and hence for the elevation of grain in transit, to be just and reasonable. Elevation is a part of transportation which the law requires the carriers to provide and for which it authorizes them to pay others reasonable compensation. The three-fourths of a cent per hundred pounds which the carriers now pay for this service at the Missouri River cities is a just and reasonable compensation for it. Whence comes the power of the commission to forbid this payment? From the facts, says the commission, that those who receive this compensation generally own the grain which they transfer and the elevators by means of which they transfer it; that they derive
257 pecuniary advantages which those who do not own the elevators and also the grain transferred do not secure by treating—that is, by cleaning, clipping, mixing, and grading—the grain as it passes through the elevators, thereby enhancing its value, and that there is danger that they may use the practice of allowing this compensation to violate the acts of Congress, to secure rebates, and effect unjust discrimination. That, although other considerations are mentioned in the opinions of some members of the commission, the facts above stated are the only ones upon which the commission relied to sustain their authority to make the orders in question, let its opinion upon the motion for another hearing (14 I. C. C. R., 510), and the order in the case of the Union Pacific Company which permits it to make this allowance to Peavey & Company on condition that the

latter separates its elevation or transfer in transit from its treatment of the grain. (Witness.)

But the legal presumption is that parties will obey the law and discharge their duties. Reasonable compensation for transfer services may not be denied lawfully, because there is a possibility that those who receive it may at some future time violate the law and secure rebates or effect discrimination. There is no more power in the commission to forbid carriers from paying or allowing for the elevation and transfer of grain in transit reasonable compensation because there is a possibility that a future violation of the law may arise out of such an allowance than there is to prohibit carriers from charging and receiving reasonable rates for transportation of all property because there would be less danger of future rebates and discriminations if they were compelled to conduct transportation without compensation.

The treatment of the grain in the elevators, the cleaning, clipping, mixing, inspecting, and grading of it is a trade service; it is no part of transportation and is not a transportation service. No power has ever been granted to the Interstate Commerce Commission to
258 regulate, to prohibit, to separate by miles from the service of elevation and transfer in transit or from any other transportation service, or to interfere with this trade service. The advantages derived from it are of the same nature as those which the owners of mills enjoy who manufacture into flour in transit the wheat which they own and ship, who saw into lumber in transit the logs which they own and ship, and who dress in transit the rough lumber which they own and ship. They are of the same nature as those which the owners and shippers of cotton, who practically own the compresses, derive from compressing the cotton in transit, and yet in all these cases the carriers maintain and the commission sustains the same rates of transportation for the shippers who own the mills, the compresses and the articles transported, and the shippers who own none of these facilities of trade and derive none of the advantages thereof. See the authorities cited at the opening of this opinion. They are of the same nature as those which the owners of cars leased to a railroad company who are shippers of the articles transported therein may derive from that ownership. Consolidated Forwarding Co. v. Southern Railway Company, 9 I. C. C. R., 182, 206e.

It is no part of the duty, nor is it within the power of the commission, to see that all shippers of like commodities derive the same measure of profit from their trade in and treatment of the articles which they ship, to see that a shipper who owns a warehouse, an industrial track and private cars derives no greater profit from dealing in the groceries or other articles he ships than a shipper who has none of these facilities, to see that a shipper of coal who owns a tipple from which he loads it gains no greater profit from the handling of his coal than one who loads it from a wagon. Harp *v.* Choctaw, Oklahoma & Gulf R. Co., 125 Fed., 445. Pecuniary advantages derived by shippers from the ownership or use of such facilities of trade are

attributable to that ownership and not to the transportation of
259 the articles shipped and the consideration and regulation of these advantages are without the scope of the commission's power.

The truth is that trade advantages of this nature do not condition the questions of reasonableness of rates, of rebates, or of discrimination. The shipper who owns warehouses, tipples, spur tracks, cars, mills, and by their use derives greater profit from the dealing in the articles which he ships over a railroad is entitled to the same rate of charge for transportation and the same reasonable compensation for transportation services which he renders that the shipper who owns less or no such trade facilities and derives less profit is entitled to. The reasonableness of and the discrimination by the charge and the compensation is conditioned by the reasonable value of the service, not by the gain or the loss which the shipper derives from the use of the trading facilities he owns in the handling of the articles transported. The pecuniary advantages that result to the owners of elevators, who are also shippers of the grain, from its treatment in their elevators, are derived not from the transportation of the grain nor from its elevation or transfer in transit through their elevators, but from their ownership or their operative control of the elevators and their use of them in the conduct of their trade. They are therefore ultra vires the commission and immaterial to the issues whether or not the compensation or allowance to the owners of elevators who are also shippers is reasonable, unjustly discriminatory or violative of the prohibition against rebates, and when these advantages are laid aside this compensation or allowance is neither.

That the commission is without power to prohibit carriers from paying or allowing to the owners of elevators reasonable compensation for elevating grain in transit, which they own and ship is demonstrated by the course of decision and legislation that is crystallized in the amended interstate commerce act. Prior to 1906 that act
260 contained no declaration that elevation or transfer in transit was a part of transportation or that compensation might be charged or allowed therefor. After the commission had decided in 1904, that the allowance by the Union Pacific Company of one and one-fourth cents per hundred pounds to Peavey & Company for the elevation of the grain in transit, the larger portion of which Peavey & Company owned and shipped, and in the year 1905 the commission made this report and recommendation to Congress:

"Terminal roads, elevator charges, and private cars.

"There is an important class of cases in which the owner of the property performs a part of the transportation service, where the carrier, by paying such owner an extravagant sum for the service rendered, thereby prefers him to other shippers of like property. This may happen in any case where the shipper is the owner of any of the facilities of transportation or performs any part of the transfer service. Such performance may take the form of an excessive division to a terminal road owned by the shipper, the payment of an ex-

cessive elevator charge to the owner of the grain; the payment of an excessive mileage upon the private car which conveys the property of the owner of the car. Our investigations leave no room for doubt that all these methods are at the present time more or less resorted to for the purpose or with the effect of preferring one shipper to another. It has been suggested that the Congress should prohibit railways from employing any agency or using any facility in the transportation of property which is furnished by the owner of the property. We hesitate to recommend at this time so drastic a measure as that. Assuming that such a law would be a constitutional exercise of authority, it would seriously interfere with property rights which have grown up under the present system. Moreover, there are many instances in which the services can be rendered or the facility furnished more advantageously both to shipper and railway and without injury to the public if provided by the shipper itself.

We do think, however, that the commission should be em-
261 powered in a case of this kind, to determine whether the allowance to the property owner is just and reasonable compensation for the serice rendered and to fix a limit which shall not be exceeded in the payment made therefor. Such a remedy would not be altogether adequate, and any remedy is extremely difficult of application, but nothing better appears to be available."

Thereupon the Congress amended section 1 of the act so that it provides that transportation shall include "all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration, icing, storing, and handling of property transported; and it shall be the duty of every carrier subject to the provisions of this act to provide and furnish such transportation upon reasonable request therefor," 34 Stat., 584; section 6, so that it provides that the schedules of rates required of the carriers shall "state separately all terminal charges, storage charges, icing charges, and all other charges which the commission may require, all privileges or facilities granted or allowed," 34 Stat., 586; and section 15, so that it provides "If the owner of property transported under this act directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable, and the commission may, after hearing on a complaint, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the service so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order, which order shall have the same force and effect and be enforced in like manner as the orders above provided for in this section." 34 Stat., 590.

The contract of the Union Pacific Company with Peavey & Company, the decision of the commission thereon in 1904, and the report of the commission in 1905, had informed the Congress, and when these amendments were enacted the members of Congress were
262 aware of the trade advantages which naturally and neces-

sarily resulted to a shipper from the ownership of cars, elevators, industrial tracks, compresses, and other facilities by which he transports his own property for a carrier and the danger of discrimination and of rebates from an "excessive division to a terminal road owned by a shipper, the payment of an excessive elevator charge to the owner of the grain and the payment of an excessive mileage upon the private car which conveys the property of the owner of the car," and in the light of all this knowledge it prescribed the remedy and fixed its limit. It is that the charge and allowance to the owner of the elevator, who is also the shipper of the grain, shall be no more than is just and reasonable and the limit of the power of the commission is to determine what is a reasonable charge as the maximum to be paid by the carrier for the service. Counsel argue that this view ignores the power vested in the commission to prevent rebates under section 2, and to repress regulations and practices of carriers that are unjustly discriminatory or unduly preferential under section 3 and section 15 of the amended act. But the permission granted by the amendment of 1906 to continue the known regulation and practice of allowing reasonable compensation for elevation and transfer in transit to shippers who were also the owners of elevators and the clear limitation in that amendment of the power of the commission to the determination of the reasonableness of the allowances thus made was, in view of the knowledge of the Congress and of the common knowledge of the pecuniary advantages derived by such shippers from this practice, a conclusive legislative determination that when the allowances were reasonable neither the fact that the shipper of the grain was the owner of the elevator nor the fact that he enhanced the value of his grain by treating it during the elevation and transfer in transit constituted a rebate, an unjust discrimination, an undue preference, or a repressible danger of either.

263 It was not only a clear withholding from the commission of the power, but an implied and effective prohibition of the commission to forbid the allowance to such shippers and owners of reasonable compensation for the elevation and transfer in transit of their grain through their elevators.

Again, the allowance here in question was not a rebate, because it was not a concession from the published schedules but an allowance in accordance with them. If it had been discriminatory it would have been because the entire rate of transportation charged by the carrier after this allowance was deducted would have been unduly preferential. But the allowance was only reasonable compensation for the service rendered and the lawful remedy, if such discrimination existed, could not have been to deprive the owner of the elevator of such compensation for the service of transportation it was rendering and thereby of a beneficial use and of a portion of the value of its elevator. In Interstate Commerce Commission v. Stickney, Supreme Court, November 29, 1909, 164 Fed., 638, 643, 644, the Supreme Court affirmed an injunction against an order of the commission, which reduced a reasonable terminal charge of $2.00 per car to $1.00

per car, on the ground that the rate of the carrier plus the terminal charge was in its opinion unreasonably high, and held that the commission's remedy was to reduce the carrier's rate and that it was beyond its power to reduce the terminal charge below reasonable compensation for the service. By the same mark it was beyond the power of the commission to prohibit the allowance or payment to the owners and operators of elevators of reasonable compensation for elevation because the carriers' rate together with that payment or allowance was discriminatory. The result is that the orders in these cases were beyond the power of the commission and that they can not be sustained.

Counsel have presented arguments upon which the orders of the commission and its announcement that the principle upon which they are founded will result in universal prohibition of payment to owners and operators of elevators throughout the land of any com-
264 pensation for elevation obviously do not rest. But these arguments have also been carefully considered.

It is said that the grain upon which the allowance is made is not elevated or transferred in transit because it is shipped from points of origin in Kansas and Nebraska to the Missouri River upon local rates and local waybills. But a proportional rate is the balance of a through rate. There are proportional rates from the Missouri River to the Mississippi River and to points east, north, and south which are less than the local rates between those points, and this grain which comes from points west of the Missouri River takes, not the local, but these proportional rates, east of the river upon the certificates or expense bills of the companies west of the river which show whence it came. Ninety per cent of the grain which comes to the Missouri River points passes through them to points east, north, and south. The schedules of the carriers and their practice limit this elevator allowance or payment to grain coming into the elevators from the west which is actually loaded out into cars sent north, south, or east, and this service of unloading grain out of cars which have brought it from the west and loading it into cars which carry it to points east, north, and south is elevation and transfer in transit within the meaning of the amended interstate commerce act.

The rate of transportation from points west of the Missouri River through the cities upon that river to St. Louis and other eastern points is the same to all shippers. All shippers are offered the option of sending their grain through these cities with or without elevation for the same price. The railroad company pays out of the amount it receives from this uniform rate three-fourths of a cent per hundred pounds to the elevator men at the river for the elevation of that part of the transported grain which is elevated in transit there in consideration of a prompt return and full use of its cars. It is insisted that this constitutes a rebate and an unjust discrimination because the net amount retained by the carrier is three-fourths of a

cent less on grain elevated than on that which is not elevated
265 and because the shipper who elevates his grain receives a service that he who does not elevate it fails to obtain. But this it not a rebate because there is no concession from the published rate here, but an allowance in accordance with that rate, section 2, and because the same service of elevation is offered to all shippers at the same price, and they are all able to accept it, and there is neither rebate nor unjust discrimination where such an offer is made, although some accept and others reject its advantages. Nicholson v. Great Western Railway Company, 1 Nev. McN. 121, 125, 129.

Much is said in argument of discrimination and preference. While general expressions may be found in the opinions of the courts to the effect that there must be no difference in charges not based on difference in service, and that the interstate commerce act was passed to secure equality of rates and to destroy favoritism, New York, New Haven & Hartford R. R. Co. v. Interstate Commerce Commission, 200 U. S., 361, the legal effect of the act is that declared by Judge Jackson, afterwards Mr. Justice Jackson of the Supreme Court, in Interstate Commerce Commission v. Baltimore & Ohio R. R. Co., 43 Fed., 37, in these words, which have been three times affirmed and adopted by the Supreme Court as the true interpretation of the law:

"Subject to the two leading prohibitions, that their charges shall not be unjust or unreasonable, and that they shall not unjustly discriminate, so as to give undue preference or disadvantage to persons or traffic similarly circumstanced, the act to regulate commerce leaves common carriers as they were at the common law, free to make special contracts looking to the increase of their business, to classify their traffic, to adjust and apportion their rates so as to meet the necessities of commerce, and generally to manage their important interests upon the same principles which are regarded as sound, and adopted in other trades and pursuits."

Interstate Commerce Commission v. Cincinnati, New Or-
266 leans & Texas Pacific Ry. Co., 167 U. S., 479, 493; Cincinnati, New Orleans & Texas Pacific Ry. Co. v. Interstate Commerce Commission, 162 U. S., 184, 196, 197; Interstate Commerce Commission v. Baltimore & Ohio R. R. Co., 145 U. S., 263; Interstate Commerce Commission v. Alabama Midland Ry. Co., 168 U. S., 144, 173. The act does not prohibit all preferences or advantages, or the production of all prejudices and disadvantages, but only those that are undue and unreasonable. Sec. 3, 24 Stat., 380; sec. 15, 34 Stat., 589.

It is contended that the allowance of the three-fourths of a cent to the owners of terminal elevators for elevation at the river constitutes a discrimination against the owners of elevators at St. Louis and points east and west of the river, to whom no such allowance is made and who cannot treat the grain during this elevation in transit. But to the companies whose termini are at the Missouri River elevation in transit there is a commercial necessity, for which they have a right to pay in order that they may secure their share

of the transportation and the full use of their cars. For this service they pay three-fourths of a cent per hundred pounds. The owners of elevators at other places cannot render this service and cannot treat this grain at these points, but they may do both and receive the compensation and benefit thereof by constructing elevators at the termini of the railroads at the Missouri River as those have done who do receive these benefits. The difference in allowance and in advantage is the just result of a difference in location and in the natural advantages of terminal elevators and cities upon the Missouri River, and it constitutes neither unjust discrimination nor undue prejudice. The Union Pacific Company and the Chicago Great Western Company, which have no railroads at St. Louis, certainly cannot be required to give to the owners of elevators and dealers in grain there the same advantages which they bring to those at the termini of their railroads. The Supreme Court, after a review of authorities, said:

"In short, the substance of all these decisions is that railways
267 are only bound to give the same terms to all persons alike under the same conditions and circumstances, and that any fact which produces an inequality of conditions and a change of circumstances justifies an inequality of charge." Interstate Commerce Commission v. Baltimore & Ohio R. R. Co., 145 U. S., 263, 283; Harp v. Choctaw, Oklahoma & Gulf R. Co., 118 Fed., 169, 175; 125 Fed., 445, 450, 453.

Railroad companies carrying wheat out of St. Louis allow for elevation at that city three-fourths of a cent per hundred pounds on grain shipped out to the south and to the southeast, and one-fourth of a cent per hundred pounds on grain shipped out to the east, but they allow and pay nothing for elevation upon grain shipped into St. Louis from the west. Complaint is made that the payment by the carriers of three-fourths of a cent per hundred pounds for elevation at Omaha and Kansas City works a discrimination between the dealer in grain who owns an elevator at St. Louis and the dealer who owns one at Omaha in this, that if the former purchases grain west of the Missouri River, ships it through Omaha to his elevator at St. Louis, and then out to some eastern point it costs him three-fourths of a cent per hundred pounds more at that point than it would cost the dealer at Omaha who has passed the grain through his elevator. The answer is that the two dealers are not similarly situated. The Union Pacific Company and the Chicago Great Western Company neither reach St. Louis nor have their termini there. Their need for elevation in transit and their competition for transportation, which constitute a controlling factor at Omaha and Kansas City, do not exist at St. Louis, and that city is many hundred miles farther distant from the grain fields. These facts extract from this difference every element of unjust discrimination or undue prejudice. East Tennessee, V. & G. Ry. Co. v. Interstate Commerce Commission, 181 U. S., 1, 12; Interstate Commerce Commission v. Alabama Midland R. R. Co., 168 U. S., 144, 171, 175; Louisville & Nashville R. R.
268 Co. v. Behlmer, 175 U. S., 648, 671, 674.

The allowance for elevation at the Missouri River points has not been made to millers who own elevators and are engaged in milling in transit there, and it is said that from this fact arises a discrimination in favor of millers at St. Louis who own elevators at Omaha or Kansas City and pass their grain through them. There is no discrimination here in favor of millers in St. Louis who have no ownership or operative control of an elevator at one of the Missouri River cities. There is no evidence that there is any miller in St. Louis who has such an ownership or control and this suggested discrimination is too theoretical and improbable to persuade. If, however, it exists, the remedy is to grant reparation to the millers who elevate their grain in transit in accordance with the schedules of the carriers at the Missouri River points, as the commission has done in the cases of the operators of other elevators there—Nebraska Iowa Grain Company v. Union Pacific R. R. Co. (Jany. 6, 1909, I. C. C. R., 90)—not to forbid all compensation for elevation in transit.

This brief review of the suggestions of counsel in support of the action of the commission discloses no rebate, no unjust discrimination, no undue prejudice, nothing that may bring the sweeping orders before us within the delegated powers of that body. On the other hand, the enforcement of these orders cannot fail to cause great losses and to entail much discrimination. It will strike down the practice of a decade in reliance upon which elevators have been built, terminal grounds in large cities have been bought and equipped, contracts have been made, business and markets have grown up, and business relations have been established. If the carriers whose roads terminate at the Missouri River cities may not pay for this elevation in transit they must furnish it themselves free or the producers and consumers whose grain passes over their roads must ultimately bear the expense of it. If they furnish it free, or if they construct elevators and charge a reasonable compensation for it, the owners
269 of the terminal elevators at the river must lose the use which in large part induced their construction and must lose a portion of their value. If the carriers charge for it, producers and consumers of grain which on account of its origin must pass, or for other reasons does pass, over their railroads must bear this charge, while those whose grain may pass over the through roads may be free from it, and this fact will necessarily have the effect to divert grain and the business in it from the Missouri River cities and to diminish the value of all investments therein in facilities for conducting it.

While these facts bear upon the wisdom and expediency of the orders they are not unworthy of serious consideration in the determination of the question whether or not the power of the commission to affect so radically the property rights and interests of the parties to these suits really exists. The conclusion of the whole matter is that the sweeping orders under consideration were beyond the delegated power of the commission, and for that reason they must be annulled and their enforcement must be enjoined. Peavey & Company pray for a recovery from the Union Pacific Company of compensa-

tion for services rendered by it between December 17, 1906, and October, 1908, when the bill in its case was filed in the elevation of grain at Omaha and Kansas City at the agreed rate of one and one-fourth cents per hundred pounds. But on April 9, 1907, the commission reduced the rate of compensation for these services to three-fourths of a cent per hundred pounds (12 I. C. C. R., 85, 90). Reasonable compensation for such services includes not only the cost of the services but reasonable reward therefor in addition, but the evidence fails to convince that three-fourths of a cent per hundred pounds then was or now is less than a reasonable compensation for these services. Peavey & Company may therefore recover of the Union Pacific Company for elevation services rendered prior to April 9, 1907, at the rate of one and one-fourth cents per hundred pounds, and for such services rendered since that date at the rate of three-fourths of a cent per hundred pounds. Let decrees be entered in accordance with the conclusions announced in this opinion.

270 UNITED STATES OF AMERICA, *set.:*

I, Adelaide Utter, clerk of the Circuit Court of the United States for the Western Division of the Western District of Missouri, do hereby certify that the above and foregoing is a full, true, and complete copy of the record, assignment of errors, and all proceedings in the cause wherein Harry J. Diffenbaugh et al. are complainants and the Interstate Commerce Commission is defendant, as fully as the same appears on file and of record in my office.

Witness my hand as clerk and the seal of said Circuit Court. Done at office in Kansas City, Missouri, this 27th day of April, A. D. 1910.

[SEAL.] ADELAIDE UTTER, *Clerk.*

(Indorsement on cover:) File No. 22172. W. Missouri. C. C. U. S. Term No., 554. The Interstate Commerce Commission, appellant, vs. Harry J. Diffenbaugh, Edmund D. Bigelow, and Charles W. Lonsdale, as officers and members of the Board of Trade of Kansas City, et al. Filed May 14th, 1910. File No. 22172.

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